C O N T E N T S.

Friday, February 21, 1941.

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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

Washington, D. C.

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Friday, February 21, 1941.

The Advisory Committee met at 10 a. m., in room 147-B, Supreme Court Building, Washington, D. C., Arthur T. Vanderbilt presiding.

Present: Arthur T. Vanderbilt, Chairman; James J. Robinson, Reporter; Alexander Holtzoff, Secretary; Newman F. Baker, George James Burke, John J. Burns, Gordon Dean, George H. Dession, Sheldon Glueck, George Z. Medalie, Lester B. Orfield, Murray Seasongood, J. O. Seth, John B. White, Herbert Wechsler, G. Aaron Youngquist.

The Chairman. Gentlemen, I approach this subject with probably more humility than any man in the room, because I am not an expert in the field of criminal law, and I am advised that the most of you are.

The only definite instruction that we have from the Chief Justice is that our product must be simple, and that it must be simply expressed. Aside from that there is no instruction to us.

Mr. Holtzoff has prepared and sent out to you a tentative division of the subject. Has each member of the committee a copy of that paper? (A pause without response.) Then I take it each member has a copy.

Perhaps it would be just as well if we had some informal

discussion as to how we might best proceed with our work. By and large we have a route laid out for us in the experience of the Advisory Committee on Rules for Civil Procedure. In addition, we have certain advantages which they did not have, in that we will have the cooperation of the judicial councils in the ten circuits and the advantage of the discussions in the judicial conferences as our work progresses.

The Chief Justice has already sent out a letter to the Circuit Judges. Mr. Holtzoff will be good enough to read that letter so that everybody may be familiar with it.

Mr. Holtzoff. This is the letter sent out by the Chief Justice to each Senior Circuit Judge, and it reads as follows:

"My dear Judge _____:

"By the Act of June 29, 1940 (Public No. 675 - 76th Congress), the Supreme Court was authorized to prescribe rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, as stated.

"To assist the Court in this undertaking, the Court has appointed an advisory committee. I enclose copies of the Act and of the Court's order.

"In the drafting of Rules of Civil Procedure, the Advisory Committee appointed by the Court was greatly aided by suggestions received from local committees throughout the country, and the Court desires to afford opportunity for similar assistance to its Advisory Commit-

tee on the Criminal Rules. The Court believes that this opportunity can best be afforded through the action of the Judicial Councils in each Circuit, as established by the Administrative Office Act. The Court suggests that you present this matter to the Judicial Council of your Circuit to the end that, under its supervision and through the action of the District Judges, or in any way deemed to be practicable, committees may be appointed in the several Districts within the Circuit for the purpose of making suggestions to the Advisory Committee in relation to Rules of Criminal Procedure as contemplated by the Act of Congress.

"The Supreme Court has no suggestion to offer as to the make-up of these local committees, being merely desirous to obtain the advantage of expert professional opinion.

"It should also be understood that there is no intention to exclude any other form of collaboration on the part of the Bench or Bar, which may be thought advisable, and it is hoped that the respective judicial councils will make it clear that the expression of views or recommendations by state or local bar associations will also be welcomed by the Advisory Committee.

"All communications from local committees or bar associations should be addressed to Arthur T. Vanderbilt, Esquire, Chairman of the Advisory Committee on Rules of Criminal Procedure, at the Supreme Court Building, Washington.

"Very sincerely,

"(Signed) Charles Evans Hughes

"P. S. It has been suggested that you may also find it desirable to include proposals as to the Rules of Criminal Procedure among the subjects to be discussed in the circuit conference."

The Chairman. That letter should result, of course, in the appointment of committees in each circuit and in each district, as was the case with respect to the civil rules.

I think the next question before us is as to whether or not we think it advisable to send an invitation to each state bar association, including the District of Columbia, and the more important city bar associations, asking their cooperation.

In that connection Mr. Holtzoff calls our attention to this situation: that when the civil rules were up for approval by the Congress that work was greatly facilitated by the fact that the Advisory Committee on Rules for Civil Procedure were able to state that there had been committees appointed by every state bar association, and the most of the local bar associations, and that they had made thousands of suggestions; that the work as ultimately produced generally met with their approval.

So here we have two aspects of the matter:

1. The getting of suggestions to help us in our work; and

2. The equally important thing of facilitating the adoption of our work when completed and presented to the Congress for its approval.

I wonder if we might now have a discussion on whether or not it would be appropriate to write the presidents or secretaries of bar associations asking for the appointment of appro-

priate committees, or the cooperation of their existing committees; and, I take it, the most of them do have committees on criminal procedure.

Mr. Youngquist. I recall that when the Rules for Civil Procedure were in preparation there was a committee appointed by the Minnesota Bar Association, which worked rather diligently on preliminary suggestions for the rules, based naturally in large part on the Minnesota procedure, and which I think is reflected to some extent in the rules as adopted. I would suppose that the first thing this committee should do would be to invite the cooperation of state bar associations, because I know from my own experience--and I am on committees there--it takes quite a little time for a state bar association to begin functioning, and after its committee begins functioning, to accomplish its work, because necessarily there is a variety of subjects to be considered, and usually there is some little time consumed before the work is completed.

I would suggest--and I do not know whether it should be made by way of motion or otherwise--that the state bar associations be invited to cooperate with this committee.

Mr. Holtzoff. I second the motion.

The Chairman. Any discussion?

Mr. Seasongood. Does that motion mean that they are to cooperate generally or specifically, and if the latter method how will it be indicated?

Mr. Youngquist. So far as I am concerned I would suppose that the method of cooperation would be outlined by the chairman of this committee. I do not feel qualified to suggest, as a part of my motion, the method of cooperation.

The Chairman. Then your motion is that the chairman be empowered to write letters to state bar associations and others seeking their cooperation in our work?

Mr. Youngquist. Yes, sir.

Mr. Burns. Might there be some danger, if you put the invitation in general terms, that it might not be as productive as though you made it specific when asking state bar associations to appoint committees?

Mr. Youngquist. My idea is that it be left to the chairman to suggest the particular mode of cooperation.

The Chairman. What I would do, if the motion is adopted, would be to look up the files and model as far as applicable any letter I might send out on what was done in the case of the Advisory Committee on Rules for Civil Procedure.

I might add that about three weeks ago I had a talk with former Attorney General Mitchell, who was chairman of the Advisory Committee on Rules for Civil Procedure, and he told me that they went to great pains to answer every letter that came in from individuals or committees, first by way of acknowledging receipt of each letter directly and promptly, and then, when they had had time to work out an answer, to answer the suggestions as fully as they could, the idea being to get the benefit of suggestions which were made, and also at the same time to do everything humanly possible to assure cooperation on the part of any person writing a letter, even though the suggestion had to be turned down.

That it seems to me is particularly important in this work we are called upon to do, because there is going to be a great deal more interest on the part of certain members of Congress

in the matter of rules of criminal procedure than there was in the case of rules for civil procedure. It is possible there are a considerable number of members of Congress who did not have as much work on the civil side as they had on the criminal side before they came to Congress, and if so they are very likely to be critical of the rules when presented. Therefore it would seem to me wise on our part to do everything we can to present a consensus of opinion in favor of our product.

3 Gentlemen, you have heard the motion. Is there any further discussion?

Mr. Seasongood. Take Ohio for instance, and we have a committee on judicial reform--I forget the exact name of it--of the Ohio State Bar Association. Thenwe have a judicial council. Then there is a third committee, which is modeled on a committee of the American Bar Association, on improvement of procedure, with local committees in each state. Would you want to have still a fourth committee? It seems to me that one or two of these committees would be appropriate to consider this matter, or would it be your thought to have a separate committee in Ohio?

Mr. Holtzoff. Mr. Chairman, may I say this: a state bar association I assume would have the choice of appointing a new committee or of delegating the work to a standing committee. That might be left to each state bar association.

Mr. Seasongood. Then you also have the judicial council.

Mr. Holtzoff. Is not the judicial council an official body rather than a committee of a bar association?

Mr. Seasongood. Yes.

The Chairman. In some states, yes; in other states, no.

Where they have an incorporated bar association it may be different.

Mr. Holtzoff. The state bar association of a state really represents the bar. It seems to me if we want the bar of the state represented in this product perhaps we ought to do our work with the state bar associations.

Mr. Youngquist. My motion was to invite the cooperation of the state bar associations.

The Chairman. Yes, and let them act as they think best. Is there any further discussion? (A pause without response.) All in favor will say aye. (A chorus of ayes) Those opposed will say no. (Silence) The motion is carried.

I am wondering if we should include in that motion, or is it necessary to make a separate motion to cover some of the more important local bar associations. I can think of some local bar associations which are really much more important than some state bar associations.

Mr. Youngquist. I think that might be included in my motion.

Mr. Holtzoff. I second the amendment of the motion.

The Chairman. Any discussion? (A pause without response.) All in favor of so amending the original motion will say aye. (A chorus of ayes.) Those opposed will say no. (Silence.) It is carried. Of course, it will be understood that the District of Columbia is included as a state bar association for the purpose of this motion.

Mr. Glueck. Might I inquire whether during the consideration of Rules for Civil Procedure each suggestion was considered separately or as a part of a group?

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The Chairman. Mr. Leland Tolman was the secretary of the Advisory Committee on Rules for Civil Procedure. Perhaps he can tell us about it.

Mr. Tolman. It was the uniform practice for every letter that came to the committee to be duplicated and sent to each member of the Advisory Committee on Rules for Civil Procedure. In addition to that the secretary prepared brief extracts of each suggestion that came in, and they were put before the committee as an agenda at the time they were considering the draft. That was the general method of dealing with the subject at that time.

The Chairman. There was really very thorough consideration given to every suggestion made.

Mr. Tolman. Yes, and I might add, it was thought quite important that we emphasize that before the Congress.

Mr. Youngquist. Mr. Chairman, I do not like to talk so much, but I note from the Act that these rules will be applicable in the District Courts of Alaska, Hawaii, Puerto Rico, the Canal Zone, and the Virgin Islands. Are there bar associations or groups of members of the bar in those places?

Mr. Holtzoff. I know that there is such a group in Puerto Rico, but do not know about Hawaii. I do not know whether there is any such organization in Alaska. I think there is one in the Canal Zone. I doubt whether there is a bar association in the Virgin Islands.

Mr. Youngquist. I take it the United States Court for China has not such a group.

The Chairman. Is it your thought that we should extend an invitation to them?

Mr. Youngquist. I think we should, because it is possible they might have peculiar situations we are not aware of.

Mr. Holtzoff. I think that would be a good idea.

The Chairman. Do you now amend your original motion to include them?

Mr. Youngquist. Yes.

Mr. Holtzoff. I second that amendment.

The Chairman. Any discussion? (A pause without response.) All in favor will say aye. (A chorus of ayes.) Those opposed will say no. (Silence.) It is carried.

There was one other group that was very helpful with respect to civil rules and should be even more helpful in respect of criminal rules. They are the United States Attorneys; also attorneys in the Department of Justice who are working in this field.

The suggestion has been made that we might ask them, or might ask the Attorney General to set up some cooperative organization. Have you been able to contact the Attorney General, Mr. Holtzoff?

Mr. Holtzoff. I thought first that we should get the wishes of this committee. I know, however, from my discussion informally some time ago with the Attorney General, that if it is the wish of this committee he will be very glad to set up a committee within the Department of Justice to act cooperatively with this advisory committee, the same as will be done by committees of state bar associations. I personally had this thought, that a committee set up within the Department of Justice could circularize United States Attorneys and get their suggestions, as well as suggestions of those within the Depart-

ment, weed them out, and submit them to us with their own comments.

The Chairman. Is it not likely that the District Judges in appointing committees would in almost every case include United States Attorneys?

Mr. Seth. That would be true in New Mexico, I am sure.

Mr. Holtzoff: That is quite likely. But I think a United States Attorney, in addition to serving as a member of a local committee, might be in position to make individual contributions. Of course, United States Attorneys are spending the most of their time in this work. Perhaps they would devote more time to the subject if they were asked by the Department of Justice to submit suggestions to the Department; I mean in addition to such work as they may choose to do as members of local committees.

Mr. Burns. Mr. Holtzoff, is not there soon to be a conference here in Washington of United States Attorneys?

Mr. Holtzoff. Yes, on the 10th, 11th, and 12th of March. That is an annual conference we have here.

Mr. Burns. That might be the appropriate time to bring this matter before them.

Mr. Holtzoff. That is one of the things we were thinking of doing in connection with United States Attorneys. I had the thought, but do not know how it will strike you gentlemen, that it might be helpful to ask the Attorney General to organize a small committee within the Department of Justice to contact for us the United States Attorneys. And, in addition, of course there would be suggestions from those within the Department that might be useful to us. We had a somewhat similar

situation in connection with the civil rules. The Attorney General appointed a committee--and I had the honor of doing that--to present the views of the Department to the Advisory Committee on Rules for Civil Procedure from time to time. I do not know how helpful that was to the committee, but it was helpful to the Department, I think, because we were able to make some suggestions that we thought might be helpful.

The Chairman. In other words, all suggestions that came in to the Department would clear through one man?

Mr. Holtzoff. Yes, or through the committee. I think that might simplify our work in making contacts.

The Chairman. Gentlemen, what is your pleasure with respect to this question?

Mr. Robinson. It seems to me it might be well to communicate directly with the United States Attorneys. That might indicate on our part a desire for their cooperation and show a proper regard for their opinions.

Mr. Holtzoff. I think that might be an excellent idea. I think you will find among United States Attorneys those who will be hesitant to make suggestions except to the Department, however. Of course, they are officers of the Department, and will want to know whether they are making suggestions contrary to the policy of the Attorney General. Probably they would rather send their suggestions through the Department.

Mr. Robinson. Well, that is merely my suggestion. Of course, we need not ask them to communicate direct to the committee, but could tell them we are expecting their cooperation and will appreciate their assistance through whatever channel may be indicated.

The Chairman. Might it not be more effective for them to communicate through the Attorney General?

Mr. Robinson. I am suggesting now that they do that, but in addition why not communicate with the United States Attorneys? I do not care to press the idea, but my contacts with United States Attorneys lead me to think they are very deeply interested in what this committee is to do. Of course, they will receive an official communication from the Attorney General, but this would be an additional communication from us if we decide to send one.

Mr. Burns. Is it not possible that this committee may be very much interested in proposals from United States Attorneys that might run contrary to those of the Department of Justice?

Mr. Robinson. I should like to have anything they might wish to suggest to us.

Mr. Holtzoff. United States Attorneys might wish to submit suggestions through the Department of Justice and let the Department weigh them first.

Mr. Youngquist. I have been thinking of one thing we must be very careful to avoid. It is hard enough to get representation on this committee on the defendant side. I have been on the defendant side a few times, but would say that 99.9 per cent of my experience has been on the prosecuting side. Perhaps there is a danger in the reception by Congress of the rules for criminal procedure as prepared by an Advisory Committee of this sort, that the interests of defendants have not been sufficiently considered; and I think the farther we get from prose-

6 cuting agencies, like the Department of Justice, the better the standing of the committee will be when our report goes to the

Congress. I have no objection at all to suggestions going through the Department, but I rather think, as Mr. Robinson expressed it, it would be a good idea to get them direct from the men in the field, where they won't have the impress of the large prosecuting agency.

Mr. Holtzoff. My first thought was that it would perhaps simplify our contacts if we had a channel through which they might come to us.

Mr. Youngquist. You are quite right. Democracies do not work simply, and if we might have a more democratic expression we will be better off. I do not mean to imply that there would be any check in the Department of Justice which would prevent suggestions of individual United States Attorneys coming to the committee. I am thinking rather of the method of the machine.

Mr. Holtzoff. Do you not think, too, that in addition to suggestions from United States Attorneys it might be helpful to have suggestions from those in the Department?

Mr. Youngquist. Oh, yes.

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Mr. Holtzoff. Then it is my understanding that the Advisory Committee suggests that we send letters to the United States Attorneys to have them submit suggestions originating from their department.

Mr. Burns. I move that the chairman request the Attorney General to appoint a committee within that department and, with that end in mind, that the chairman send letters to all Attorney Generals requesting them to cooperate.

The Chairman. Are there any suggestions?

(There were no responses.)

The Chairman. All those in favor of this motion say aye.

(There was a chorus of ayes.)

The Chairman. All those opposed to this motion say nay.

(There was no response.)

The Chairman. Then, the motion is carried.

Are there any points the members of the committee have in mind that they believe we should take up with respect to establishing contact with various groups throughout the country?

Mr. Burns. What was the procedure with reference to the members of Congress when the rules of civil procedure were revised?

Mr. Holtzoff. The members of Congress were not contacted at all until after the rules of civil procedure were promulgated. After these rules were set up they were then submitted to the Congress in accordance with the provisions of the enabling act.

Mr. Youngquist. That calls for the question as to whether or not to ask for their advice or suggestions.

Mr. Holtzoff. Eventually they will have to pass upon our

work.

The Chairman. I also think that seeking their advice would get us into a great deal of trouble because immediately you run into two groups of Congressmen. There is a group of Congressmen from the large cities, and then the group of Congressmen from the rural places. Thus, two diverse points of view are likely to cause friction when the rules come up for discussion.

Mr. Robinson. You prefer not to give any of them the status of suggesting?

Mr. Holtzoff. The statute gives them the inferential status for getting our work when the rules are promulgated.

Mr. Waite. Am I correct in gathering from this discussion that Congress is expected to eventually enact this into law?

The Chairman. Well, the same procedure is called for here as under the enabling act for the revision of the civil rules. After these rules are prepared they are laid before Congress to give them an opportunity to consider them. In the case of the civil rules they had hearings which ran for several days and into which they went quite thoroughly. Our enabling act provides for that same type of procedure. This is done primarily not for the purpose of revision but for the purpose of considering it.

Mr. Holtzoff. Well, the enabling act allows Congress to determine the final results. It gives Congress the veto power.

Mr.Robinson. In other words, such rules shall not take effect until after the close of some Congressional session? Is that the meaning of the enabling act?

Mr. Holtzoff. It is to that effect.

However, we have that whole period in which to go over this thing. THE Chairman:

Now, if there are no further suggestions as to additional groups with which to establish relations for the purpose of cooperation we, perhaps, should turn to the tentative memorandum which Mr. Holtzoff prepared for distribution to the members of the committee.

Mr. Wechsler. May I make one more suggestion with relation to the topic of group relationship?

The Chairman. Yes.

Mr. Wechsler. Unlike civil rules, criminal rules will bring us into contact with groups other than lawyers. In so far as, we may have to deal with rules under the Federal Juvenile Delinquency Act I am wondering if we can get the cooperation and help by contacting some of the social service groups. We ought to give this age matter some attention.

Mr. Holtzoff. I am in full agreement with Mr. Wechsler. Perhaps, we could get the American Probation Association to help us.

Mr. Burns. There are many communities that are rather advanced in this respect. I think they should be contacted for information.

Mr. Holtzoff. But those reports would reflect on the conditions in that particular state.

Mr. Burns. Well, they might or might not be useful for our purposes.

Mr. Holtzoff. Their reports would better enable us to deal with this problem.

Mr. Burns. They each would have certain points of view.

The Chairman. They could make a very definite contribution.

Mr. Glueck. Isn't there a national association that could deal with this problem at hand?

Mr. Holtzoff. There is such an association we could contact.

Mr. Glueck. I think there was such an organization. I just don't recall the name offhand.

The Chairman. Will each member of the committee make suggestions as to the different kinds of groups to contact so that we may contact them and, if possible, get their help and contribution. Is there any other opinion on this?

Mr. Seasongood. I believe we ought to write to these various groups also.

The Chairman. Then, do you wish to amend the original motion?

Mr. Wechsler. I think it would be a good idea.

Mr. Seasongood. I move to amend that motion.

Mr. Wechsler. I second it.

The Chairman. All those in favor say aye.

(There was a chorus of ayes.)

The Chairman. All those against this amendment to the motion say nay.

(There was no response.)

The Chairman. Then, the motion is carried.

Mr. Glueck. May I again interrupt before we go into the memorandum? I wonder, if you would be so kind as to explain the machinery here. I am referring especially to the rules of the reporter and the secretary. That is to say, how will this material be cleared through and who will make the draft of the

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various tentative stages of our discussion?

The Chairman. Well, as I understand the plan, and this is the procedure of the earlier committee, the draft emanated from the reporter and his staff with the aid of the committee and with the aid of the secretary. In other words, the reporter is the one who is primarily charged with seeing that we are supplied with additional drafts as the work progresses. The secretary will have charge of corresponding with the various bodies that we have been considering here within the last few minutes and with individual lawyers. The secretary will also cooperate in all possible ways with the reporter in connection with the functions of this reporter, but I say that it is the duty of the reporter to bring about the draft. The duty of the secretary is to look after the correspondence and to cooperate to the fullest possible extent with the reporter.

Mr. Holtzoff, is that your motion?

Mr. Holtzoff. That is exactly my notion.

Mr. Youngquist. Well, the Chief Justice seems to indicate that by the letter that came to me. Ithink that was the case in the earlier committee.

The Chairman. I understand that Attorney General Mitchell had the reporter and his staff handle all the correspondence. Our additional job is to get a preliminary draft. To do that the reporter, I imagine, would like some instruction as to the scope of the draft. I understand, from Mr. Mitchell, that the question of the scope of this draft was one that caused a great deal of trouble.

Should they have new rules of evidence ? Just what are the limits?

I have a notion that as we go along we will come across the things we will want to revise. Anyway, let us make some preliminary guide.

Has everyone had time to look over his memorandum?

Mr. Glueck. In respect to the very first item, warrants of arrest, the question arises as to whether the rule should include the statement of the law of arrest or not. I would say not.

Mr. Holtzoff. I would say that is going into the procedure. It is not within the scope of this committee, which was appointed by the Supreme Court as a result of the enabling act, to go outside of the procedure of the case itself. We could hardly cover the various phases.

The Chairman. I recall hearing some discussion on the question of evidence which was one of the problems of the earlier committee. Whether we can bring that within the scope of our work is a problem which we will have to work out as we go along.

Suppose you run down the line and ask each of the members of the committee to discuss any of the topics that seem to them to deserve comment either by way of suggesting their exclusion or application. Or you may comment on any other point.

Mr. Glueck. I should think the question of examination ought to be included. All examinations in petty offenses are dispensable by the commissioner.

Mr. Holtzoff. I suppose that would come under the scope of that heading. Some of them do not exist in the federal system but we would be authorized to propose them. This discussion would come under that heading.

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The Chairman. Do you suggest amending point 1 to include the word examinations?

Mr. Glueck. Yes.

The Chairman. Suppose we just handle these things informally and take notes because this is only tentative. Later on the reporter can give us the findings.

Mr. Waite. I am now speaking with respect to item No. 1. I wonder if by going into the subject of arrests by means of warrants this approach would justify our going into the subject of arrests without warrants? If we talk about one we ought to talk about the other.

Mr. Holtzoff. There is this difference. The warrant is issued by an official officer, so it is part of the procedure in the case.

Mr. Waite. I take it you have in mind that we will take up only the discussion of the issues of the warrant rather than the arrest by means of the warrant?

3 Mr. Glueck. How about discussing the technicalities of the warrant?

Mr. Holtzoff. Yes, the technicalities of the warrant, how it may be issued and so forth.

Mr. Glueck. How about the scope of the evidence on which the warrant is issued?

Mr. Burns. There may be a limitation. If there is not we ought to step into that. It is a pretty difficult field.

Mr. Waite. Now, that raises a point right at the start. This is an extremely important question. How far afield can we go? I agree with Mr. Burns that the matter of arrest is an extremely important and technical one. This is especially true

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if we include arrest and detention of persons. In my mind, I think it is a very important one. I believe we should also go into the things that occur before the case began. We ought to take that matter up.

Mr. Holtzoff. My understanding is that we are limited in some discussions.

The Chairman. That is my belief too, but I think we may have to stretch in some places and contract in some others.

Mr. Glueck. I think, Mr. Chairman, we may have to consider all these administrative items in order to understand that properly. These will have to be gone over even though we do not include them in the draft of the law.

The Chairman. Yes. Then, it is your notion that we should give some consideration to this topic of arrest without a warrant.

Mr. Waite. Are we permitted to go into that phase of the case?

Mr. Wechsler. We might not be able to go into the detention of a prisoner whatever before the indictment, but after the indictment I think we may.

The Chairman. All right, if there are no further suggestions we will proceed to item No. 2. Item No. 2 is entitled search warrants.

Mr. Glueck. May I suggest apropos of the question raised by Mr. Waite: I think there is a basic problem here with respect to the scope of our authority and work. It might be wise for the reporter to write an introductory statement with the draft indicating what is to be included and what is to be excluded. It is understood, of course, that this is necessary

under the terms of our authority. This should be done because we may run into this problem all the way through.

Mr. Robinson. That is in line with this discussion; yes.

Mr. Burns. Well, can that be done adequately in advance?

Mr. Glueck. Just as a preliminary so that we may know where we are going.

The Chairman. Now, getting back to item No. 2, which is entitled search warrants. Are there any suggestions with respect to that?

Mr. Burns. Let it be within the scope of this committee's work to deal with that conflict of invalid search warrants.

Mr. Glueck. There is another problem in my mind, that is, to determine whether to excuse evidence obtained by means of these search warrants. That seems to have been decided by the Supreme Court.

Mr. Holtzoff. I am inclined to agree with Professor Glueck. On the other hand, the charge of obtaining evidence illegally is within the angle of our work.

Mr. Glueck. That is a very good illustration.

Mr. Holtzoff. These things may be difficult to decide until we get down to the preliminaries of the draft.

Mr. Burns. Involves--Whether you can waive that sort of thing--so it is within our scope.

Mr. Holtzoff. Yes, within item No. 2.

Mr. Glueck. And the timeliness too.

Mr. Wechsler. It might be exceedingly helpful in deciding preliminary questions of this sort if at the start we have before us in some workable form references to the existing statute on criminal procedure. There should be some indication

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what Congress has undertaken.

Mr. Holtzoff. Of course we will have some form of procedure.

Mr. Wechsler. Yes.

The Chairman. We have the existing statutory law and decisions. I suppose they really would make the first page.

Mr. Youngquist. Then tentatively we are going to include arrests under No. 10 but we want to include evidence under No. 2?

Mr. Glueck. You mean, search is an instance of arrest, is that what you mean?

Mr. Youngquist. There is reasonable cause to believe that all search is by warrant.

Mr. Holtzoff. What about the search of an automobile on the highway without a warrant?

Mr. Burns. There is one question that occurs to me in connection with search. This topic, what are the rights of the defendant with reference to fingerprinting and physical examination, may be covered under paragraph 8. However, can you tell me whether that is covered specifically?

Mr. Holtzoff. No, it is not. I have a distinct feeling that it is outside of the scope of this committee. The enabling act under which this work is being done bars the court from promulgating rules of procedure in the case, so to speak. The question of fingerprinting the defendant is a matter that is outside of the court of procedure.

Mr. Burns. Well, it certainly is not outside of the court procedure. Rather, it is very much analogous to it, and I think the law is very vague in that respect. It is an established

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practice and it is in existence in the various districts, but I think we might look into the evidence and perhaps do an effective job in making it universal.

Mr. Holtzoff. Administrative practice has been approved by the Court of Appeals. It seems to me that regulation of an administrative practice is outside of the scope of this committee.

Mr. Burns. There is still some question as to whether the marshal will fingerprint a person unless the court arrests him and puts him in his custody.

Mr. Holtzoff. The marshal fingerprints the person who is arrested. The court has no authority in the matter. At one time that practice was challenged, but it was upheld before the circuit court.

Mr. Dession. Not all witnesses are arrested; some appear voluntarily.

Mr. Burns. That is the type of person I had in mind when I made my statement.

Mr. Holtzoff. Those who appear voluntarily surrender themselves to the marshal. There are instances where that is evaded but they are exceptions.

The Chairman. May we note that problem and let the reporter trouble with it.

Mr. Glueck. May I suggest that under the title search warrant there be put more details?

The Chairman. Yes, the members of the committee desire it.

Mr. Glueck. That is, the question of the procedure for correcting the warrant comes under the term defects, I suppose.

The Chairman. If there are no more suggestions with respect

to item 2, let us pass on to item No. 3, which is titled preliminary hearings before United States commissioners and other committing magistrates.

Mr. Glueck. I notice the point regarding notification of counsel does not come in this memoranda until farther down. I think in real life much of the dirty work at the crossroads, certainly in state courts, curves around the state of their ways.

Mr. Holtzoff. Well, according to the Supreme Court decision and the constitutional right of the counsel he attaches himself at the arraignment after an indictment.

Mr. Glueck. I understand that the real trouble occurs farther back in the practice; certainly in state procedure.

The Chairman. Certainly it is a real enough issue to deserve an investigation on our part.

Mr. Holtzoff. Oh, yes.

Mr. Waite. I would like to suggest to the reporter in connection with the preliminary hearing that we consider the matter of perpetuation by the magistrate of testimony of the witness who must appear later. I also suggest that we cover that ever prevailing question at the bar, evidence in the case of the defendant by the magistrate.

Mr. Robinson. Is that the English system?

Mr. Waite. That is the French system, I believe.

Mr. Glueck. Apropos to that, there is a question also whereby the committing magistrate shall use a definite formula in notifying the person of the right to counsel and that defendant should not have to say anything, et cetera. In general, there is a question in criminal practice whether it should

be left absolutely discretionary.

The Chairman. There is a very interesting little book in the first of a series which deals in one chapter with several of these problems. Do you recall the name?

Mr. Glueck. I know that book you mean.

The Chairman. It is an English book.

Mr. Glueck. No, I had in mind a book by an American.

The Chairman. This book was published late last year.

Mr. Baker. Is it Mr. Turner?

The Chairman. This book contains chapters written by different authors.

Are there any other items to discuss under point No. 3?

(There was no response.)

The Chairman. Now, under point 4 we have the title indictments: substitute a short form indictment for the archaic, prolix, technical forms of indictments that are still used in the Federal courts and that frequently give rise to the interposition of technicalities and the writing of briefs and the preparation of arguments over points that have no bearing upon the merits of the case.

Mr. Glueck. Are we to provide draft of simplified indictments for simple crimes?

Mr. Holtzoff. I would like to call attention that the rules for simplicity are in the appendix of forms.

Mr. Waite. I think, if we do a good job on this number 4 we will have justified our existence. I think it ought to be tied in with item 14. That ought to be straight in view with any particular form which would indicate there should not be a right to a bill of particulars.

Mr. Baker. That could be done by making it compulsory so that it then becomes a part of the record.

Mr. Waite. That is right.

Mr. Holtzoff. Of course, you do not have to give a weapon to defense counsel for dilatory tactics.

Mr. Waite. In the Massachusetts practice where they have the short form of indictment, which the statute contains, there is an exact form where you just fill in the date in any particular circumstance. They give you the particulars, and as a matter of fact the practice is exactly the same for the bill of particulars. Even, in the ordinary felony cases it is done that way. However, in the Federal courts we have certain difficulty in the making of the bill of particulars.

Mr. Wechsler. Then the bill of particulars seem to be an appropriate topic for discussion.

The Chairman. Both New York and Massachusetts have the short form of indictment and we will be able to get some points from there.

Mr. Glueck. Of course in the Federal courts we have special types of crime in addition to the common ones.

Mr. Holtzoff. Well, you could omit such statements as "Wilfully knowing", et cetera, that clutter up the indictment, anyway.

Mr. Burns. I think that the most complicated Federal statute could be brought within the orbit.

Mr. Baker. The same question applies to the code of civil procedure.

Mr. Holtzoff. I imagine the reporter would want that material.

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The Chairman. There is an appendix to the code and I think we could very easily get copies of it. Is there any member of the committee who does not have one? I think we will all be able to get hold of a copy. Is there any further discussion on point No. 4?

Mr. Burns. I wonder if we could consider the types of joinder.

Mr. Waite. What about the problem of amending the indictment?

Mr. Holtzoff. Well, you are up against a constitutional question.

Mr. Youngquist. Well, not entirely.

Mr. Seth. Are there rules providing for the amending? They are amended every day.

Mr. Holtzoff. The guarantee of the amendment might be constitutional.

Mr. Seth. Yes.

Mr. Wechsler. I believe that substantial changes can be made in the indictment.

The Chairman. I think we should note that these subjects should be inquired into.

Mr. Robinson. Of course, you have the constitutional guarantee of all . infamous crime. The Supreme Court has defined what . infamous crime was. We are hedged in by the constitutional limitation.

Mr. Waite. Perhaps the Supreme Court might be led to modify this stand by our suggestion.

(Laughter.)

Mr. Wechsler. There is another subject in connection

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with indictments which is not mentioned here. That is the subject of grand jury proceedings. I think there is a great deal to discuss in connection with the regulation and proceedings of grand juries, and also with respect to the rights of witnesses.

The Chairman. Do you suggest that should be a separate point?

Mr. Wechsler. Well, in this order of points I think it comes under--

The Chairman. Well, it would really come in about 3-A.

Mr. Glueck. That is right, about 3-A.

Mr. Holtzoff. 3-A.

The Chairman. Is there any further discussion on indictments?

(There was no response.)

The Chairman. Now we pass on to point No. 5: warrants to apprehend indicted persons.

Mr. Baker. Is there any particular problem?

Mr. Holtzoff. No, just to make sure that we are covered by rule. There is no particular problem in connection with point No. 5.

Mr. Glueck. What about John Doe warrants? Should that be in the rules? I believe you should describe him if you don't know him.

Mr. Holtzoff. You mean the warrant without names?

Mr. Glueck. Yes.

Mr. Holtzoff. Yes, I think that is a matter that might well be covered.

The Chairman. Point No. 6 deals with arraignment.

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Mr. Robinson. I think it is shape now as a result of the recent case.

Mr. Glueck. I think that the rules should include an order that arraignment should be seasonable.

Mr. Holtzoff. That might well come within the scope of that type.

Mr. Glueck. In fact, there should be a time limit in dealing with cases.

Mr. Robinson. I think that plea is causing quite a bit of discussion.

Mr. Holtzoff. I think plea comes under a different item.

Mr. Robinson. You don't mean nolo [contendere?] joinder?

Mr. Holtzoff. Well, that should be included.

The Chairman. Now, with respect to item 7: assignment of counsel. There should be a rule protecting the right of indigent prisoners to representation by counsel (See Johnson v. Zerbst, 304 U.S. 458), imposing an affirmative duty on the court to explain to such a prisoner that counsel will be appointed for him if he so desires and inquiring whether he wishes such an appointment to be made. No plea should be taken, and no trial should be proceeded with without assistance of counsel for the defense, either retained by the defendant or appointed by the court, as above, unless the defendant affirmatively waives his right to being represented by counsel and such waiver is noted in the record.

Mr. Seth. Under the recent Supreme Court decision Johnson v. Zerbst counsel will be appointed for the defendant unless he affirmatively waives his right to be so represented.

Mr. Glueck. I think Mr. Wechsler had something to do with

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that case.

Mr. Wechelser. Yes.

Mr. Glueck. I suppose it causes all sorts of complications in the department.

Mr. Holtzoff. Instructions are issued to all United States Attorneys to see to it that the Judge apprises the defendant of his right to counsel and of his right to have

6 counsel appointed for him.

Mr. Glueck. I think it referred to persons already serving sentences. Well, we had quite a number of persons who said they had been serving sentences and were not apprised before of their right to counsel. They only assigned counsel to them when they went to trial. The court did not assign counsel unless the person affirmatively asked for counsel.

Mr. Holtzoff. All I can say is that they were apprised of that fact.

Mr. Burns. What about the mechanics of the record? Should there be an actual stenographic record of the proceedings in arraignment?

Mr. Holtzoff. Unfortunately, there are no official stenographers in the Federal courts. It would take an act of Congress to get this additional appropriation which would run into a great expense. The department has not required any stenographic transcript of the case, but the clerk's minutes must show the proceedings at the trial.

Mr. Burns. I think that the matter, particularly in serious felony cases, you have to be careful lest the slipshod informal manner of the handling of the case should result in a grave injustice. I wonder if that is a matter that should

be taken into consideration? If it is not appropriate for a rule that might make some revision.

Mr. Wechsler. I think the whole question of record is a vital question. I think they ought to make up a separate point. We can, at least, discuss the problem even if we are limited.

Mr. Holtzoff. I think there should be something said about the manner of keeping the court records.

The Chairman. Do you suggest, Mr. Wechsler, that it include it as a separate item?

Mr. Wechsler. Yes.

Mr. Holtzoff. You can make that 7-A.

Mr. Robinson. Have you included the form of judgment?

Mr. Holtzoff. I think that is covered.

Mr. Seasongood. I think it is a shame the way they assign these boys who just get out of law school to these cases.

Mr. Holtzoff. That is why we have not urged the Government to make a better defense for it. So far, we have not made very much progress in the direction of the public defender system. But, there is a real need for that.

The Chairman. You take the position that there is a need for a public defender?

Mr. Holtzoff. There is an old-fashioned idea that it seems silly to have one man to prosecute and another man to defend. It is very difficult to get that notion out of some people's minds.

Mr. Youngquist. In one of our counties we have made provision for a public defender.

Mr. Holtzoff. The public defender has been a great success

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in Los Angeles and other great cities. It has helped to do away with delays.

The Chairman. In Connecticut they are appointed by the court.

Mr. Holtzoff. One in each county.

Mr. Seasongood. In Cincinnati the Legal Aid Society furnishes a voluntary defender in small cases.

Mr. Holtzoff. They have that in New York, too.

Mr. Seasongood. The court should consider such agencies for appointment.

The Chairman. Now, there is the question of bail.

Mr. Glueck. That includes the regulation of professional bondsmen, checking up on the amount of property, and so forth. I think we ought to have a bail clerk, or somebody, in the court to check up on the words of a person giving the undertaking.

Mr. Holtzoff. Yes, indeed, we have millions of dollars on the books forfeited for bonds which are uncollectible because of financial responsibility. In many cases the bondsman was good for that particular bond but he has written so many that a number are worthless. There is no checkup.

Mr. Burns. I understand that the Clerk in New York copies a list of approved surety companies. Is that because he is on the job, or because there is some administrative regulation?

Mr. Holtzoff. There is an administrative regulation.

The Chairman. The United States Treasury Department has a list of surety companies which comes down quarterly.

Mr. Glueck. Well, what about the procedure of Federal courts regarding the proceedings to collect on forfeited bonds

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if they have enough evidence?

Mr. Holtzoff. The United States Attorneys are supposed to do that. In fact, we have an assistant in the department with supervision over that kind of work.

Mr. Burns. I imagine that question ought to be left completely as intradepartment and not to be attached as a question of this rules committee. I am referring to the bail bond situation.

Mr. Glueck. But on the checking up of the worthiness of the bondsmen, there ought to be a rule.

Mr. Holtzoff. Yes. There ought to be some rule to guide the Commissioner as to how to judge the validity or the worthiness of the bond or the responsibility of the bondsman.

Mr. Burns. That would be a very difficult rule to draft.

7 Mr. Holtzoff. That is where the difficulty comes in. The bondsman that gives his bond in court can be checked by the United States Attorney who is present. But, it is this bondsman before the United States Commissioner that creates a problem. It is a problem.

Mr. Burns. The problem is created because they take on too much. Perhaps, we could limit the number of bondsmen.

Mr. Holtzoff. You don't want to limit the selection of bondsmen because then you come across what is known as the professional bondsman.

Mr. Baker. Just a word about Chicago. The lesiglature adopted a large number of rules concerning bonds and they made it so difficult to obtain bonds that they turned it all over to the insurance companies and bonding companies, most of whom have a political tieup. It is almost impossible for any

person or any individual to satisfy the bonding requirements set up by them. I should think it would be very difficult for us to establish rules which would apply in the country districts as well as in the city districts.

Mr. Holtzoff. It might be very difficult but don't you think it is a problem worthy of consideration?

The Chairman. I should think that that is an administration problem rather than one of rules.

Mr. Wechsler. Is there any procedure in the Federal courts for release on parole instead of bail?

Mr. Holtzoff. Well, persons can be released on their own recognizance.

Mr. Wechsler. Persons can be released but on their own recognizance.

Mr. Seasongood. Attorneys sometimes are given the responsibility.

Mr. Wechsler. There is the possibility of having a bail problem for releasing a person, a responsible person, without paying a bondsman, as in the case of an unfortunate.

The Chairman. Are there any further suggestions or questions on item No. 8? If not, we will proceed to item No. 9.

Mr. Glueck. Before we go to that, Mr. Chairman, there is one problem in connection with bail that bothers me. What about the question of the poor defendant who just can't offer bail bond even if he hocks the family furniture and, as a result, is sent to jail just because he has no money. I don't know whether we can do anything about it.

Mr. Burns. Perhaps we could formulate a rule that would give this kind of case priority.

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Mr. Holtzoff. Naturally they are given priority. Jail cases are always handled first. Where the real trouble arises is in the rural districts where there might be five or six months between the terms of the court. We had a case, a while ago, where a person had been in jail as a result of an indictment for as long as his sentence.

Mr. Seth. Most judges take that into consideration.

Mr. Burns. You will meet that kind of situation everywhere.

Mr. Holtzoff. Judges do give priority to jail cases. That is, wherever possible.

Mr. Seasongood. That is only done in the cases where one pleads guilty.

Mr. Burns. No, not necessarily. They can proceed by information and then you can go to trial.

Mr. Youngquist. But, in all cases, you have to have a term of court.

The Chairman. Let us, for example, take the situation as it arises in Virginia. Up there in the mountains you have a term of court that meets once in a few weeks. Thus, a great deal of time elapses between the terms.

Mr. Holtzoff. If the defendant waives the indictment and wants to have his case tried, in the entire division, the United States Attorney can arrange for its immediate disposal. The defendant is brought to trial immediately if he waives his indictment. In this instance, the case can be early and properly tried. He does not have to wait for any grand jury to indict him.

Mr. Glueck. Then the lapse of time is in connection

with the grand jury action?

Mr.Holtzoff. Yes.

Mr. Seth. That can be dealt with.

Mr. Holtzoff. You can never diminish the number of offices and positions. You have all you can do to discourage the creation of new ones.

The Chairman. You will find that a great deal of pride exists in local communities in connection with the courts, and so on.

Mr. Youngquist. Besides the pride there is also the pay roll.

Mr. Holtzoff. Well, the chambers of commerce had a lot to do with it.

Mr. Waite. It has been indicated that Washington is outside of the jurisdiction of this committee. Just as a matter of information I would like to know if the Federal law is invariable.

Mr. Holtzoff. Yes, except that Congress frequently passes private bills.

Now, going back again to the bail bond situation. The court does have authority to review the forfeiture of bond if the fault was not wilful. My recollection is that you can collect a part of it, not the whole bond, if the defendant or the bondsman is not entirely responsible.

Mr. Burns. That is a question for the Treasury Department.

Mr. Holtzoff. No, the Attorney General.

Mr. Seasongood. The value is equivalent to about one-tenth of the bond.

Mr. Holtzoff. There is no procedure here except that we

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have a lot of old defaulted bonds where the financial responsibility of the bondsmen is, undoubtedly, very bad. Ordinarily, the current practice is forfeiture.

Mr. Robinson. Of course, you are talking about the several crime services in Illinois and Missouri. There it is set up by the prosecuting attorney with the idea of taking it out of the docket of the case and simply handing it over to the judgment of the court. Then, at the end, to proceed to recover by action on that judgment.

Mr. Holtzoff. There is such procedure in the Federal courts.

Mr. Youngquist. It is absurd to bring such a suit. Bring summary judgment.

Mr. Waite. There is a considerable number of sections on this topic in the American Law Institute Code.

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The Chairman. Point 8. Bail: that has been covered.

Point 9. There seems to be considerable to that.

Mr. Seth. Should the rules provide where an indictment has been returned,production of the indictment and proof of identity is sufficient to justify removal?

Mr. Holtzoff. I feel very strongly the rules should so provide. Otherwise, is to permit a Judge in a distant district to retry the question whether the grand jury was warranted in returning the indictment against the defendant.

Mr. Burns. Often an underworld character.

Mr. Seth. Or anyone else for that matter.

Mr. Burns. Mr. Holtzoff suggested,in addition, in these removal proceedings, the point that where an information is involved the prosecution should be put to the necessity of making out a prima facie case. It seems to me that the cases of injustice where an information is the basis are [illegible]e; that it should be limited there to the question of identity.

Mr. Holtzoff. I didn't mean to extend it to cases where an information was filed, but where a preliminary complaint is filed before a Commissioner, and removal is sought before indictment. There, perhaps, a different question arises. You might want to take your prisoner into custody; you might have a fugitive.

Mr. Burns. That is a practical matter. He could be taken into custody and held pending the filing of a proper information.

Mr. Youngquist. I can't see much difference between an information and complaint in that case. Where the indictment is returned I agree fully that proof of identity should be suf-

ficient.

Mr. Burns. I have in mind a case which makes me feel strongly in favor of this suggestion. An indictment was returned in New York and appropriate papers forwarded to Florida. There the matter came up before a rather complacent Commissioner who refused to believe the Government had made out a case before the grand jury and, so far as I know, the defendant is still in Florida.

Mr. Holtzoff. We had a case some years ago where it took several years to remove a defendant across the Hudson River from New Jersey to the Southern District of New York.

Mr. Seth. And, of course, that case where removal was sought from Louisiana to Texas.

Mr. Wechsler. On the other hand, this question of removal is bound up with the constitutional provision and statutes. And it is not hard to imagine instances where considerable hardship may be suffered by defendants. It is not a difficult thing now for a New York defendant to be removed to California on a mail fraud conspiracy chargewhereall that has happened is that the letter was written in California. I think we can agree that the way to approach this problem is not to make the removal difficult but, on the other hand, to preserve the defendant's rights, at the same time keeping in mind, as I say, the statute and constitutional provisions.

Mr. Holtzoff. The only federal rule is that under the Constitution the defendant is entitled to be tried in the District in which the crime is alleged to have been committed.

The Chairman. Yes, but it might be committed in several districts.

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Mr. Waite. I think Mr. Wechsler has a point that will definitely require consideration; the extremely complicated question involving the place where the crime may have been committed in more than one district or jurisdiction.

The Chairman. I had a recent experience with a prosecution under the Sherman Anti-trust Act. A number of lumber companies were indicted. They did all their business in the State of Washington and the State of Oregon, and the indictment was returned by the grand jury in the District Court for the Southern District of California, where there was one selling agent for this corporation. All the activities complained of had occurred in Washington and Oregon. I think we ought to consider whether it would be too much of a handicap on the Government if there were some changes made in procedure in this connection; that is, as to where the trial should be had.

Mr. Wechsler. As a matter of fact, I don't believe the Government can change the venue if it wants to.

Mr. Holtzoff. At present there is no provision for changing the venue.

Mr. Burns. I have in mind a change in procedure. Congress has said that if the crime is committed in a jurisdiction, a district, it must be tried there, but the procedural question is quite another matter.

Mr. Youngquist. The question has two aspects, in other words, hasn't it: the question of the right to prosecute, which is solely in Congress; and the laying of the venue for a particular prosecution: wouldn't that also be solely a matter within the control of Congress?

Mr. Holtzoff. That is true certainly as to what constitutes

an offense; that is really a matter of substantive law rather than procedure.

Mr. Youngquist. Suppose there are degrees of commission; suppose 99 per cent of the crime was committed in one district, and one per cent in another. For instance, the sending say of a letter in a state far distant from the place where the major portion of the offense was committed. Couldn't Congress provide that the prosecution in that event should take place in the first district? I am just thinking of the abuses that might be avoided by limiting the power of the prosecutor to pick the court in which the prosecution shall take place.

Mr. Burns. That is also called "picking the Judge".

Mr. Youngquist. That is something that is now within the control of the prosecution; it is not within the control of the defendant. I think that should be considered.

Mr. Wechsler. In other words, is this it: if it is a rule of substantive law as to where the offense is said to have been committed, it is not a rule, or is it, of procedure as to where it shall be prosecuted.

The Chairman. Well, in any event, we will consider that question.

Mr. Waite. Under 9-A, I suggestthat the reporter consider the pros and cons on the rules such as obtain in a great many states now, that venue will be assumed to be as laid, even in the absence of affirmative proof unless it is disputed. It has been a very helpful rule in some states.

Mr. Seasongood. If the objection is based on the indictment, should we go into the merits of the charge? In other words, I don't think if the indictment was obtained improperly

the defendant ought to be dragged away.

Mr. Holtzoff. Shouldn't that question be determined in the district where the indictment is returned? In other words, to hold otherwise, you would have to retry the action of the grand jury which originally returned the indictment. Actually, our experience is that it very rarely happens that there is a removal which results in injustice. What ordinarly happens is that we get a delay of two or three years in removing the defendant, and I think it has been a scandal and a miscarriage of justice that some times it takes months, and even years, to remove a defendant for trial.

Mr. Burns. Isn't it the practice, even if you are defeated in these removal proceedings to reindict?

Mr. Holtzoff. Well, sometimes the statute of limitations has run. Of course, you could rearrest and try the thing again on a removal proceeding, but that is not a very satisfactory thing to do. Further, there is a sort of comity which requires a Judge, unless there are exceptional circumstances, to follow the ruling made by the previous Judge.

Mr. Seasongood. However, the practical matter is that it is a hardship on a defendant to be removed from say Maine to California without going into, as you say here, the "merits of the charge".

The Chairman. Item 10, waiver of indictment.

Mr. Holtzoff. I have given quite a lot of thought to that. I am firmly of the opinion that the question is constitutional. The Supreme Court has held that a defendant may waive a trial by jury, which is a constitutional liberty, so it is reasonable to suppose that they would hold that he could waive the indict-

ment. That was the basis of the Juvenile Delinquency Act, and the courts are administering that act without difficulty.

The Chairman. Well, in many states grand juries have become out moded, have they not?

Mr. Youngquist. Our statute in Minnesota provides that the defendant may file a petition asking the county attorney to file an information. In that case you have the defendant's own petition, and his own signature on it to prove that he has made the request; and it works satisfactorily.

Mr. Holtzoff. That might be a little cumbersome. If a defendant in open court waived the indictment after the Judge had explained to him his rights, that might be perhaps sufficient.

Mr. Youngquist. Undoubtedly it would be. I am merely pointing out the way we do it. There you have an absolute act on the part of the defendant and it avoids all question.

Mr. Baker. I suppose that topic on the record will list the specific items with which we are to deal.

The Chairman. Anything further under 10? If not, we will go to 11, Motion to test sufficiency of the indictment, and proceedings leading up to it.

Mr. Baker. What did you have reference to with reference to that rule 5-A, I didn't have a chance to look that up.

Mr. Holtzoff. That is the rule which requires all objections, either technical or substantive, going to the jurisdiction or to the sufficiency of the complaint, information or indictment to be raised by motion.

Mr. Baker. By one catch-all motion?

Mr. Holtzoff. Yes, one catch-all motion.

Mr. Burns. I think that is a very fine suggestion.

Mr. Baker. How will the lawyers earn their fees if you don't have these distinctions?

The Chairman. Item 11 will be just as popularas the simplified indictment.

Mr. Seasongood. Would it be possible to, under 12, to put that under a Motion to Dismiss, as well? It seems to me that the ideal system would be to have a Motion to Dismiss, or a plea of guilty or not guilty. I should think it would be simpler to bring everything in that is possible under this one Motion to Dismiss, and I certainly agree the subject matter of 11 should be brought in; why not go all-hog and bring in 12.

Mr. Youngquist. Yes, 12 really should come in under 11. Plea of double jeopardy, plea of former acquittal should come in. That is a matter of proof.

4 Mr. Holtzoff. Yes.

Mr. Baker. Under such a motion you would proceed to proof, would you not?

Mr. Holtzoff. Of course, of old the defendant was entitled to a jury trial on a plea of double jeopardy or former acquittal. While the situation was an absurdity, it is a fact that he was entitled to a jury trial on those issues.

Mr. Youngquist. I didn't quite follow you.

Mr. Holtzoff. My understanding is that formerly a defendant was entitled to a jury trial on the issue raised by his plea of double jeopardy or former acquittal.

Mr. Burns. And also as to the statute of limitations.

Mr. Holtzoff. Yes.

Mr. Burns. Yes, but that doesn't affect the matter of the

simplified procedure, which will avoid delay. He can go ahead under a plea of not guilty and try the issue of the statute of limitations, for instance.

Mr. Seth. But there ought to be a provision that a plea of not guilty is not a waiver on his part of the right to test those questions.

Mr. Youngquist. I may be old-fashioned, but it seems peculiar to me to try a motion by jury.

The Chairman. Yes, there you have a question of law and fact.

Mr. Seasongood. In the civil rules, it says:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may be at the option of the pleader made by motion: (1) Lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted."

Mr. Burns. Isn't it true, in criminal procedure, that if a defendant intends to rely on the statute of limitations he just pleads not guilty and raises the point at the trial?

Mr. Youngquist. That is not true in our jurisdiction.

Mr. Holtzoff. One of the things we want to do is to make him raise that point by motion.

Mr. Youngquist. That isn't true in our state. A plea of

former conviction or former acquittal or double jeopardy is not included in the plea of not guilty. A plea of former jeopardy is a separate plea, but I see no reason why it could not be joined, if it was to be tried by a jury.

Mr. Burns. There is a constitutional problem there.

Mr. Baker. And you would include the plea of insanity under not guilty?

Mr. Holtzoff. I think there ought to be notice of any such plea.

Mr. Baker. And the same with regard to alibi?

Mr. Holtzoff. Yes.

Mr. Robinson. That was one of the first things they eliminated inthe civil rules, surprise. Both the prosecution and the defense should know what theory the case is going to be tried on.

Mr. Burns. The defense of alibi is not so difficult to contend with as double jeopardy. I think alibi is not such a clear-cut defense as the other defenses you have mentioned.

??? Mr. Holtzoff. Ohio or Michigan has a requirement that where the defense of alibi is to be depended on notice must be given because experience has shown that very frequently the officers are taken by surprise at the trial by alibi testimony. There is no way for the officers to investigate or to check the truth of the assertion made at the trial, and there are instances where false alibis have prevailed because of the surprise which the issue of alibi presented.

Now, it seems to that if a defendant wants to claim an alibi,--if he claims that was some where else at the time of the commission of the alleged offense--I think he ought to be

required to give notice of that fact. Such a rule has worked in a few states I know of.

Mr. Burns. Is that the sole contention, of not being present at the time of the offense? Doesn't it have a technical contention?

Mr. Seth. The great trouble with such a rule as that is because the Government may prove the defendant committed the offense any time within the period covered by the statute of limitations. The defendant may not know as to when and as of what date he should set up his alibi.

Mr. Holtzoff. That is taken care of by another statute. In those states where the rule is as I have indicated, the prosecution is required to prove just at what time the state contends the crime occurred.

Mr. Wechsler. What is the penalty on the state, in a case where the alibi defense is asserted, what is the penalty for the state's failure to furnish that information?

Mr. Robinson. Well, we haven't had any case interpreting those requirements. As a matter of practice, the Trial Judge is very reluctant to admit such proof at the trial.

Mr. Holtzoff. Isn't it the rule or the practice to permit a continuance of the trial if alibi is asserted for the first time at the hearing?

Mr. Burns. There would be no sense in requiring theprosecution to disclose its case beforehand; the defendant doesn't do it. I don't think that the defense's alibi has worked to the disadvantage of the Government to such an extent that we ought to make this change.

Mr. Holtzoff. I don't think it has worked to the disadvan-

tage of the Government but very little, not as frequently as in state courts, but it is something, a subject worthy of further consideration.

Mr. Burns. I have an impression that in the Federal Courts the Judges are more likely to grant continuances in those cases, even where the jury has been impaneled.

Mr. Holtzoff. No, certainly they don't do it very often.

Mr. Burns. I know that it has been done in New York.

Mr. Holtzoff. Continuances of how long?

Mr. Burns. Oh, four or five days. The jury is just allowed to go.

Mr. Holtzoff. Well, some Judges are very accommodating; others are not.

Mr. Baker. Is it proposed to gather the experiences of different prosecutors in different jurisdictions so that we may be guided by that experience?

The Chairman. I suppose we must do that. Now, have we covered 13? Now, 14: bills of particulars.

Mr. Baker. Could you give an illustration of what you mean by "dilatory tactics"? Do you mean not being satisfied with the content of the bill of particulars?

Mr. Holtzoff. That is one phase of it, and then asking for a bill of particulars when the indictment itself actually apprizes the defendant of all the necessary elements, and which gives him all the information he is entitled to have.

Mr. Robinson. In your own District of Chicago, the United States Attorney has said that the practice there incident to bills of particulars leads to a great deal of delay.

Mr. Baker. It is true that if we scale the indictment down

to a statement of bare essentials we naturally have to provide for a number of rules concerning the bill of particulars.

Mr. Holtzoff. Yes, but the rules should be so drawn as not to be available for dilatory tactics. For instance, if in a short form of murder indictment an indictment charging that on such and such a day at such and such a place John Smith killed such and such a person by shooting, I think it would be all the details necessary to apprize the defendant of the crime with which he was charged.

Mr. Seth. And in a conspiracy trial what about the overt acts? Would you say they should be left to a bill of particulars?

Mr. Holtzoff. I am not prepared to answer that. But you take an average indictment in a mail fraud case. By omitting "willfully," "fraudulently"; you can scale it down to two or three pages of allegations of fact.

Mr. Glueck: You have to allege the mental state; maybe "Willfully" in those cases means something.

Mr. Holzhoff: Yes, but the purpose of the indictment is to apprize the defendant of the crime with which he is charged and to enable him to avoid double jeopardy. Now, where it alleges all the elements of the offense, as required by the statute, isn't that all that is necessary; so long as all the elements are proven at the trial. Suppose your information or indictment omits the word "willfully": what does that add to it; what difference does it make? Now, today, such an indictment would be demurrable. What fact is left out if that word is omitted after all; it adds nothing to the contents of the indictment, which is to apprize the defendant of the

offense with which he is charged and to enable him to prepare his defense.

Mr. Baker: I think myself that a lot of time and effort is dissipated in unnecessary language. It is all right when you think of the major crimes in the crime catalogue. Under the Federal practice, as I understand it, if your claim is that the defendant is guilty of a substantive offense because he conspired with a person who committed the offense, it is necessary to set forth the details. In that type of a situation it might be proper; certainly, something can be done in the way of eliminating unnecessary language.

Mr. Burns: I think there is much to be said in favor of adopting the short form. Make that bare -and then give him a bill of particulars, leaving to the trial judge to determine whether there is abuse of that. I think the advantage of the bill of particulars is that you are not then in a pleading mood, and you can enlighten the defendant accurately. The sin is not always on the defendant's side because time and time again the prosecutor seeks to be overly smart and keep the defendant in the dark. It is the function of the trial judge to strike a balance between them. I know of cases where judges have entertained five separate motions for bills of particulars because of the evasiveness of the bill of particulars furnished.

Mr. Seth: The right to raise the question as to whether a crime has been committed, before trial, should not be done away with.. The indictment should state sufficient facts.

Mr. Seasongood: How about technical defects in the indictment; shouldn't we consider them?

Mr. Glueck: And the question whether technical defects may

be amended then and there.

Mr. Baker: We have numbers assigned here, but shouldn't the discussion as to the bill of particulars be connected with the indictment?

Mr. Holzhoff: I think youare right: this is only a tentative arrangement, without any thought that this arrangement should be followed.

Mr. Baker: The defendant should have the right to a bill of particulars, under the supervision of the judge, and I think he should get what he is entitled to. I think this fits in with the subject of the Indictment, doesn't it?

The Chairman: You think this point 14 should be made 4-A?

Mr. Baker. Possibly so.

The Chairman. Now, 15: mental capacity of defendant.

Mr. Glueck. One more subdivision might be added, that is the mental condition of the defendant after sentence and before execution.

Mr. Holtzoff. I had thought that went beyond our scope.

The Chairman. I suppose we are going to find some other matters related to these topics which we have not discussed.

Mr. Seth. How about jurisdiction in United States Commissioners to sentence?

Mr. Holtzoff. There is a recent act of Congress permitting Commissioners to try petty offenses committed on Federal reservations, and the Supreme Court has issued a set of rules within the past month or two covering those particular proceedings.

Mr. Wechsler. How about sentence: is that part of the judgment for this purpose?

Mr. Holtzoff. I have always assumed it was.

Mr. Youngquist. The rules ought to go beyond the verdict.

Mr. Holtzoff. The rules do not cover sentence.

Mr. Glueck. The sentence is left high and dry.

Mr. Holtzoff. I think we should construe our charter to cover sentences.

Mr. Robinson. I should think the Court in receiving the plea, fixing time for sentence, and imposing sentence, is in more or less one operation.

Mr. Holtzoff. The Supreme Court certainly has the authority to regulate that phase because the entire field is covered. The only question is whether the order appointing this commit-

tee is sufficiently broad to permit us to go beyond the verdict.

The Chairman. It says " * * * with respect to proceedings in criminal cases after verdict". And the same language is present in the act giving the Supreme Court of the United States power, "--with respect to proceedings in criminal cases after verdict". There is a paragraph here--"Sentence after a plea of guilty or verdict of guilty by the jury or by the Judge, where the jury is waived" et cetera.

Mr. Burns. I don't think we should go into the matters after verdict, such as probation, et cetera.

Mr. Robinson. There is a feeling that theprocedure on appeals might be changed for the better.

The Chairman. The next paragraph deals with motions. I think we are confined generally to the limitations imposed under the provisions of the act. Anything further under 15?

Mr. Seasongood. May we provide that the report of an officer appointed by the Court or whose duty it is generally to investigate or examine before trial a person accused of an offense shall be admissible in evidence? Would that interfere with the constitutional provision?

Mr. Glueck. I think the reporter should look into the so-called "Bridge" law in Massachusetts, which appears to be operating satisfactorily. It provides for an examination of persons accused of felonies by experts assigned by a state department. The report is not admissible in evidence. It is filed with the Court, and the Judge, District Attorney, and defense counsel all consult it. In practice, the district attorney is frequently very reluctant to disregard it and is willing to accept a plea to second degree murder, say, where it would

otherwise appear to be a first degree murder case. Where the psychiatrist's report says "Technically this person could not
8 be acquitted, as being insane, but nevertheless he is on the borderline with some mental disorder". Now, that kind of report usually affects the discretion of the district attorney and induces him to accept a lesser degree plea, and the practice is then for the man to be transferred from the state prison to a mental hospital, so that you get the result that you are after without complicating matters; and this is all done without deciding whether this report should be received in evidence.

Mr. Burns. And it limits the number of defenses of insanity.

Mr. Glueck. The expense is very low. The state provides a fee of about $10 an examination to the doctor.

Mr. Holtzoff. It wouldn't cost anything at all to the Government in the Federal Court because the United States Public Health Service would make the examination.

Mr. Youngquist. Have they psychiatrists in all states?

Mr. Holtzoff. Yes, as a matter of fact, they furnish such service in some districts.

Mr. Glueck. And they furnish that service in federal prisons, and they are located all over the country.

Mr. Youngquist. It would be a simple matter to handle even in districts where the health service was not available. You could call on the state department to provide the expert. I don't know whether that is any serious obstacle; it doesn't appear to be.

Mr. Baker. The American Bar Association had a medical--legal committee which proposed a statute having to do with court-

appointed experts. Such a statute is now constitutional in Wisconsin. I think in Michigan it was held unconstitutional.

Mr. Seasongood. In Michigan they held that experts appointed by the Court would be more likely to be believed by the jury than if privately called. They held the statute unconstitutional.

Mr. Baker. This paragraph on page 5. It seems to me to turn upon the question of whether the Court has the inherent power to appoint experts.

Mr. Holtzoff. The question has been raised. I am sure the Court has the power to call its own experts. The question, however, is as to whether the report of the Court's expert can be used in evidence. Perhaps not.

Mr. Seasongood. I don't see why, unless you said submitting a man to the examination was a violation of his privilege not to be required to be a witness against himself.

Mr. Holtzoff. The Supreme Court has held otherwise; there have been cases of detectives, for example, who have tried to determine whether the defendant's footprints are the same as those of the suspected person, and that has always held not to be a violation of the person's rights.

Mr. Waite. Not always; the Georgia case is to the contrary.

Mr. Holtzoff. Well, the Federal cases have so held.

Mr. Glueck. It would be in the same class as fingerprints, wouldn't it?

Mr. Holtzoff. Yes, it is an extension of the fingerprint situation.

Mr. Baker. By the way, I suppose that refers to the plea of insanity, No. 12; insanity under 15 deals with the matter of

proof.

Mr. Wechsler. Before we get to evidence, may I suggest the general subject of discovery, concerning which there are very elaborate rules in existence; I mean, in civil cases. In criminal cases, criminal procedure, it is chaotic. There has been but very little light thrown on the subject. It should be gone into very thoroughly.

Mr. Holtzoff. That comes under 17, I think.

The Chairman. 16-A, entitled "Discovery". We will mark it 16-A.

We are now down to item 16: Are there any suggestions on the problem of Experts' Testimony?

Mr. Youngquist. I think if they were eliminated entirely we would be better off.

Mr. Baker. By having the Court appoint experts?

The Chairman. I don't suppose it would be possible to do uniformly as is done in England and in several of the states; limit the number of experts.

Mr. Baker. The Court has discretion to limit the number of character witnesses. In dealing with expert witnesses in a criminal case I suppose a defendant would have the right to bring in as many as he wanted. In the Lindbergh case they had all the experts in the country. I don't see how you could very well limit their number.

Mr. Holtzoff. Oh, I don't know. Suppose the defendant defends under a claim of insanity. Take an extreme case, suppose he hired every alienist in the country. Could he bring them all in and insist he had a right to have them heard? I think the Court has discretion to say it is merely cumulative,

and to shut off an excessive number of such witnesses the same as he would have in the case of character witnesses.

Mr. Baker. It may be that it would be a matter for the discretion of the Trial Court.

The Chairman. Any further questions on this topic No. 16?

Mr. Seasongood. Can I go back to 15: on this question of insanity is there anything you do by way of definition in determining the capacity? That is, it might not be the same; it might not mean the same in every instance. You use the word "insanity"; I don't believe that is quite the expression.

Mr. Holtzoff. I should say "mental capacity" would be the better term.

Mr. Waite. You might follow the definition in the dictionary: "insane, insanity,--words of no definite meaning now--used only by the legal profession".

Mr. Dession. We would do a good service if we avoided using that word altogether.

Mr. Robinson (to Mr. Glueck). Aren't you an expert on that?

Mr. Glueck. No, I wrote a book on it, but I am not an expert. You spoke about the "Bridge's" law.

Mr. Robinson. You wouldn't want their reports to be accepted?

Mr. Glueck. No, I would prefer to have them take the stand. Apropos to this expert testimony generally, there are some questions involved--engineering questions and the like: do you have in mind that the Court should have a panel of experts, or do you think we should define what constitutes an expert?

Mr. Holtzoff. No, no: what I was thinking about was ex-

perts in dealing with evidence.

Mr. Robinson. I think there are some statutes providing that the expert appointed by the Court may testify.

Mr. Waite. I am inclined to think the Ohio law is a little better than the Massachusetts law on that point.

Mr. Robinson. It follows the Code, doesn't it?

Mr. Waite. Not precisely; there is a difference.

Mr. Holtzoff. I think our rule ought to cover other forms of expert testimony than mere testimony of a psychiatrist.

Mr. Youngquist. I don't suppose there would be much of a field other than that.

10 Mr. Holtzoff. Oh, yes, handwriting experts, ballistics; any number of others. In the Department of Justice Building we have a whole floor, a criminal laboratory where there are any number of studies made, such as automobile tires.

The Chairman. Works of art.

Mr. Holtzoff. Yes, the possibilities are as great as the human imagination.

Mr. Youngquist. I was thinking maybe in class disputes.

Mr. Burns. You wouldn't withhold the power from the defendant to subpoena experts, except under the general power of the Court to prevent cumulative testimony, would you?

Mr. Holtzoff. No, I think it would be unconstitutional.

Mr. Glueck. The point is that if a tradition grows up of the Court selecting competent and unprejudiced experts some of this other stuff will wither away.

Mr. Holtzoff. In the District of Columbia, for a great many years, there was an official psychiatrist known as the District Alienist, whose duty it was to make a preliminary ex-

amination in every case where there was a question of the defendant's capacity, mental capacity; and if he reported the man was mentally incompetent, the District Attorney, as a matter of practice, just didn't prosecute the case. He just accepted the report of the psychiatrist. In other words, it was, as Mr. Glueck says, a tradition that grew up.

Mr. Youngquist. Was he a public officer?

Mr. Holtzoff. Yes.

Mr. Waite. You have two problems. There is the Griggs law. The District of Columbia alienist would undoubtedly be interested in preventing an insane person from being convicted, but not so much interested in seeing that a sane person was not set free.

The Chairman. Now, we will proceed to 17. Depositions.

Mr. Waite. It is my impression that there might be some provision permitting the prosecution to take depositions.

Mr. Holtzoff. Some states do not have the constitutional provision requiring the defendant to be confronted with the witnesses against him, do they? Aren't there some such jurisdictions?

Mr. Waite. Yes. There is a provision, for instance, permitting the prosecution to take depositions provided the defendantaccompanies him and is present at the time of the taking of the deposition.

Mr. Dession. We have never had a test to determine whether such a statute would violate the constitutional provision.

Mr. Burns. They certainly permit the defendant to take depositions. I am wondering if we could not constitutionally provide that the government could do likewise. I have no doubt

that the Government could take them if the defendant asked that it be done, his request operating as a waiver; or can you waive that?

Mr. Holtzoff. Oh, yes, you can waive that.

Mr. Waite. I was trying to make the point that there is no question of the right of the prosecution to take depositions if the defendant is present.

Mr. Holtzoff. I assume you mean that the defendant would be accompanied by the marshal, assuming he was in custody.

Mr. Glueck. You couldn't compel the defendant to travel with the district attorney, I don't suppose.

Mr. Holtzoff. Why not?

Mr. Dession. As I understand it, all he has is the right to be confronted with the witnesses against him. Of course, if he waived that right, there would be no question of it, as I see it.

Mr. Holtzoff. Well, defendants in criminal cases don't do much waiving except where the waiver will benefit them.

Mr. Seasongood. I am under the impression they have such a rule in Ohio, and it ought to be looked into.

Mr. Baker. I think there are a number of states which permit depositions where the defendant is present and has the right to cross-examine the witness. Of course, that carries along the idea of a lawyer traveling with the defendant and that makes it a rather complicated business.

Mr. Glueck. And would the state pay for the defendant's lawyer's fees and expenses or compel the defendant to pay that bill?

Mr. Baker. Well, they don't pay if he has money to employ

counsel; if he is an indigent, the Court may make an order authorizing it.

Mr. Glueck. That sounds almost like making the defendant pay for the privilege of assisting the prosecutor to build up a case against him.

Mr. Dession. I think we ought to explore the question of authorizing ordinary depositions in these cases, as they are provided for in civil cases.

Mr. Seth. What do you mean by "ordinary" cases?

Mr. Dession. I just wanted to differentiate between the idea of taking a deposition in a c iminal case where it was necessary to have the defendant travel; whether it might not be possible to use ordinary depositions, at least in preliminary matters. Mr. Medalie has given a great deal of thought to that. I recall he has been advocating something like that for many years.

The Chairman. Item 18. Subpoenas for witnesses.

Mr. Seasongood. What is the matter with the present procedure?

Mr. Holtzoff. There is no problem; it is a matter that should be covered by the rules.

Mr. Youngquist. Is that covered by statute now?

Mr. Holtzoff. Yes.

The Chairman. If there are no questions under 18, we will proceed to 19, The trial.

Mr. Seasongood. I suppose the list of witnesses is available to the defendant in most instances, is it not?

Mr. Holtzoff. Today, under present practice, the list of witnesses is not available to the defendant. Persons that ap-

pear before the grand jury are noted in the indictment, but the balance of the prosecution witnesses are not available to the defendant and the names of defense witnesses are never available to the prosecution. Perhaps consideration might be given to the question of whether they should be. I rather believe in eliminating all surprise as much as possible.

Mr. Seasongood. I think it is a legitimate proposition for the defendant, if the prosecution subpoenas a witness and doesn't call him, to call such person, and, if he wishes, to comment on the fact; or, the other way, if the defendant has a witness who might be of some importance and is not put on the stand, it might be a subject properly of comment by the prosecution.

Mr. Holtzoff. I thought you referred to having advance notice of the names of the witnesses.

Mr. Seasongood. I think that too. The question has come up whether one side can talk to the other side's witnesses. I think that should be allowed too; they don't own the witnesses; the rule should apply equally to both sides.

Mr. Youngquist. I think there is a statute permitting either party to call witnesses who do not take the stand, whether subpoenaed or not.

Mr. Holtzoff. There is no such provision at present in the federal procedure, but it is a subject of discretion with the trial Judge.

Mr. Dession. While we are on the subject of subpoenas, should we or should we not go also into the procedure incident to issuing and serving them, or is there any practical difficulty about that?

Mr. Youngquist. I have wondered at times whether subponeas duces tecum should only issue by direction of the trial

12 Judge?

Mr. Holtzoff. That is now the provision in the civil rules.

Mr. Youngquist. There have been too many instances where the privilege has been abused.

Mr. Holtzoff. Of course, you can always move to vacate a subpoena duces tecum, if it is excessive or oppressive.

Mr. Seasongood. Who can? The person subpoeaned?

Mr. Holtzoff. Yes.

Mr. Seasongood. I think it ought to be in the rules. There ought to be some provision which will protect persons from not being burdened unduly by abuse of the use of such subpoenas.

Mr. Holtzoff. I am thinking of the civil rules for the minute. There you have to move to vacate, if you claim it is excessive or oppressive. The courts have held you can't defend against a contempt proceeding by failing to produce the documents required under the subpoena; that you have to move to vacate. I agree that that is a matter which should be covered under item 18.

The Chairman. Anything further under 18? If not, we will proceed to item 19. Trial.

Mr. Baker. I would like to ask a question as to our limit on this question; whether it includes the mode of selection of a trial jury. Do you have in mind the matter of the trial Judge qualifying the jurors, for instance?

Mr. Holtzoff. Yes.

Mr. Baker. Well, in my district it is a matter which has occasioned a great deal of grief, this matter of the selection of

juries, particularly when, say, a South Carolina lawyer moves into Illinois to try a case. I wonder whether it would not be advisable for this committee to try to make up rules governing the selection of juries from the very beginning, from the first step, on through their qualifications and final selection.

Mr. Holtzoff. I wonder whether to go that far is within our province under this question. The statutes provide the mode of impaneling juries, generally. I had in mind here, under this item, the mode of impaneling a jury for a particular case, rather than the summoning of the panel.

The Chairman. There has been a tremendous difference in the practice in the different districts. I remember specifically of a trial in a civil case where the challenges were limited to three. I expressed the view that that was unreasonable, giving my reasons therefor. The Court pointed out that what I feared could not happen because their practice is for the Judge to conduct a preliminary inquiry, in which he asks the individual juror if he knows the parties, their counsel, et cetera, in which way he disposes of most of the matters which would afford ground for challenge. Under that practice the three challenges were entirely adequate.

Mr. Holtzoff. I think in most federal jurisdictions, districts, the Judge conducts the examination of the jury. At the present time, he certainly does it in civil cases. I think that is one of the reasons why you don't find so much delay in the selection of the jury in the federal court that you find in the state court.

Mr. Burns. Are we to review the procedure of selecting grand juries? Of course that is controlled by statute. How-

ever, I have heard many objections to the present mode of selection; that the clerks of court are really in a position to say who shall compose the grand jury.

Mr. Holtzoff. The present provision is that there shall be a jury commissioner, who is appointed by the Court. The statute further provides that he must be of the opposite political party than the clerk, and that the clerk and Commissioner alternately put the names into the jury box from which
13 is drawn a list of at least 300 jurors,--names. Of course from that number the ultimate grand jury is selected. Now, I think that is the reason why the clerk is said to have such an influence in the selection of the grand jury. The statute permits the practice I have indicated. I don't know whether it is within our scope to go into that.

Mr. Burns. It should be.

Mr. Seth. In our district it is the practice to select the names of the prospective grand jurors from the most responsible element in the community.

Mr. Holtzoff. That is done wherever you have a conscientious Judge, Commissioner and Clerk. I know in one district where the Jury Commissioner, for instance, takes the membership list of some of the clubs in the community and from their membership makes the selection.

Mr. Wechsler. Others write to the postmasters.

Mr. Burns. Or to the chairman of the Republican Town Committee.

The Chairman. Or, as in my district, the Grand Louge of Masons.

Mr. Baker. Who selects that list inthe first instance?

Mr. Holtzoff. The statute merely requires the clerk and jury commissioner who must be, as I have said, members of parties of opposite political faith, to alternately submit the names for the list. Under that, they may use any members they choose in making their selection.

Mr. Seth. The Federal Statute requires the state law to be followed. Our District Judges determine the qualifications, one of which is whether they speak the English language.

Mr. Holtzoff. The Federal statute requires the state law to be followed only in the matter of qualifications, but not as to the mode of selection.

Mr. Burns. It seems to me the matter is one of great importance. We ought to take a look at the various statutes and see how they work.

Mr. Baker. I know very little about it, but this provision that the state law must be followed with regard to the qualifications has resulted, as I understand it, in a great deal of confusion all over the country. Could we draft a uniform law covering qualifications which would be applicable all over the country?

Mr. Holtzoff. Of course, you have two distinct subjects: the qualifications of the jurors and the manner of their selection. The matter of qualifications of jurors, I should say, is outside the scope of this inquiry.

The Chairman. Shouldn't we at least look into the matter?

Mr. Robinson. I think so. In Kansas City the question of selection of jurors has arisen and the Court has held that the method there used was a good system. That there wasn't any impropriety in it.

Mr. Holtzoff. Or we can look into the so-called "key" system followed in Cleveland.

Mr. Waite. It is used in Cincinnati.

Mr. Seasongood. Also in Detroit.

Mr. Holtzoff. That is one reason why I have some doubt in my mind as to whether this question is within the scope of this committee's work because, as I understand it, the matter of the qualifications of jurors being a statutory one, seems not to be subject to ru[illegible]

Mr. Young [illegible] to me that it is not so clearly outside our scope that we have to keep away from it. We should investigate it preliminarily, anyway.

The Chairman. We will designate it 19-A, adding a paragraph "Selection of juries".

Mr. Seasongood. In connection with the selection of juries I am not as enthusiastic about saving a little time as a good many. Those who advocate examination of the prospective jurors by the trial Judge solely often do so with the practice in England in mind. There however the Judge is a person of enormous trial experience. Our ordinary trial Judge in this country is not such a person. He may have no experience when he is appointed. I think it is all right to have the Judge ask a few general questions, but I don't think you ought to keep counsel from asking prospective jurors individual questions. It is not always the question that is asked. I find that if you can ask a question and observe the way it is answered you can often learn much. You don't always get the fact of the vice by general questions. I have often seen it occur that the prospective juror has been asked by the trial Judge as to whether or not he

knew the defendant, or his counsel, and having answered that he did not you found out afterwards that he did. So, it is my opinion the time element is not of such tremendous moment--suppose it takes an additional half hour--that we should deprive counsel of the right to interrogate the prospective jurors

14 individually.

Mr. Burns. Don't many Federal Judges permit individual interrogation?

Mr. Seasongood. I think so. Of course, it is all right for a Judge to ask a few preliminary questions.

Mr. Holtzoff. Yes, but on the other hand we want to avoid the situation with which all of us are familiar, where it takes several weeks to get a jury.

Mr. Burns. But isn't that alwaysin the discretion of the Judge? I recall in a number of cases where Judge Cox has said to counsel, "You have three-quarters of an hour to get your jury". After one or two questions you either have a hot lead or you are stalling.

The Chairman. Gentlemen, shall we adjourn for a little lunch?

Mr. Waite. When do we reconvene? My lunch won't take long. I just thought if you were not going to reconvene for some time I would take a little walk.

The Chairman. Suppose we allow a half hour. It is one-five; we will resume at one-thirty-five.

(Thereupon at 1:05 p. m. a recess was taken until 1:35 o'clock p. m. of the same day.)

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A F T E R R E C E S S

The Committee was called to order at 2 p. m. o'clock.

The Chairman. We are now up to item No. 20.

Mr. Gleuck. I want to mention, in connection with item 19, that there ought to be some rule as to what the jurors may take with them into the jury room.

Mr. Seasongood. The present rule gives the court discretionary powers.

Mr. Holtzoff. I am under the impression that they have to take exhibits and pleading according to the discretion of the court.

Mr. Baker. There are a number of things that might be considered with reference to instructions to juries. We have not anything here as to that.

Mr. Holtzoff. Well, instructions to jury are so covered by the Supreme Court decisions.

Mr. Baker. Well, I wondered whether the reporter would want to sift those decisions and formulate the rules based upon them.

Mr. Holtzoff. The general feature of the rule is that the judge may comment on the evidence. If you put that into those rules you will have a battle royal in Congress.

The Chairman. I think we had better let counsel guide us on these matters.

Mr. Seasongood. What about the examination of the Grand Jury minutes? Should there be anything of that kind?

Mr. Holtzoff. Well, in a great many instances no minutes are taken as far as the Federal Courts are concerned. The better practice, as I see it, is where minutes are taken and

an arbiter is not allowed.

Mr. Robinson. New York has that.

Mr. Holtzoff. It is used in small common prosecutors' cases.

Mr. Seasongood. Since they decide that you could not take a verdict of the jury and then enter a judgment of acquittal, in that oil case. If you remember, the judge overruled the men to acquit and said he would like to review the evidence which he let go to the jury. They found him guilty and then he entered a judgment of acquittal notwithstanding the verdict.

Mr. Holtzoff. The Supreme Court upheld that.

Mr. Seth. It was upheld by an evenly divided court.

Mr. Seasongood. That is a very desirable practice.

Mr. Holtzoff. It is a desirable practice. It is similar to the civil rules.

Mr. Burns. They have the practice in Massachusetts whereby the judge asks the jury for permission to enter a verdict. The judgment, notwithstanding the verdict, of course is just merely routine because the jury never said no. Before the judge submits the case to the jury and after examination of the law he may determine that the case should have been directed in the first instant and thus have avoided the expense of a second trial.

Mr. Holtzoff. Under similar rules, you recall, it is provided that reservation is automatic. In these cases the judge automatically reserves the right to decide the motion afterward.

Mr. Burns. I suppose the constitutional question, as you all know, is to have the jury give the verdict. But, what the

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judge really decides is that as a matter of law the case would not be submitted to the jury.

Mr. Holtzoff. There would not be a clear constitutional question.

Mr. Seasongood. But the prosecution did take their case up.

Mr. Holtzoff. The prosecution claimed the judge was without power to classify such a motion after the verdict of the jury, and the Supreme Court by a divided opinion uphold that. But this point might well be covered by this rules committee.

Mr. Seasongood. The oath to witnesses on Grand Juries, as I understand it, is not a statutory oath. There is some division of opinion in the Federal Courts as to charges that the oath stands for all time, and there are others who believe that the oath stands only for the duration of the term. Now, terms are abolished so why shouldn't these oaths be abolished?

Mr. Holtzoff. They are abolished only underthe civil rules. In criminal terms the oath of secrecy goes on.

Mr. Seasongood. There is some confusion because our local judges follow the local practice. They are under the impression that the oath of secrecy exists at all times. Sometimes that works harshly. There are other courts that say it exists only until the end of the term.

Mr. Holtzoff. In the case where a Grand Jury finds no truth, shouldn't that secrecy exist for all time?

Mr. Seasongood. Well, I don't know. I think in some places they say the necessity for secrecy is only to the extent of the term. I am thinking where there has been an indictment.

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Mr. Holtzoff. In the caseswhere there has been an indictment, secrecy is for the protection of the persons involved.

Mr. Seasongood. I am just presenting it as a matter for discussion. I know there is a different interpretation of secrecy in some circuits. Some say it exists for all time and some say forthe length of time of the term. There is a divided opinion on that.

Although I don't know whether that is a subject for us.

Mr. Robinson. I believe that the oath should be permanent.

Mr. Seasongood. In many instances, no, it should be extended only to the term or until the criminals have been apprehended and given bond.

10 Mr. Robinson. That oath is always open to judicial inquiry.

Mr. Seasongood. In the American Medical case they said you have to have some evidence for permission to go into it. That would make it necessary to listen in at the keyhole.

(Laughter.)

Mr. Seth. Should we cover also what is covered by the statute, that is, what goes on the floor? Should we cover the right of the Grand Jury to have a stenographer?

Mr. Holtzoff. That is now covered by statute.

Mr. Seth. It should be permitted. That seems to give the Court discretion to open the Grand Jury minutes, as you mentioned a while ago, with respect to improper evidence.

Mr. Seasongood. I don't think the sedrecy applies to the prosecutor or to any witnesses unless it is charged.

Mr. Holtzoff. Oh, yes, secrecy applies to witnesses.

Mr. Youngquist. It has been the practice to bring the

witnesses before the Court to take an oath of secrecy before they enter the Grand Jury room.

So the prosecutor seems to have the necessary oath of secrecy.

Mr. Holtzoff. The Court holds that it is brought about by the proceedings.

Mr. Burns. You think it is important to determine what the juror said within the Grand Jury room?

Mr. Seasongood. There has been a decision where a judge did impose the oath of secrecy upon a witness. Thereupon the witness told what had taken place in the Grand Jury room. He was held in contempt by the court. Which follows that unless the courts impose the oath of secrecy upon the witness, secrecy does not extend to the witness or the prosecutor.

Mr. Youngquist. The practice of secrecy is not uniform in all districts.

Mr. Holtzoff. Yes, but those districts where they do not administer the oath of secrecy to the witnesses, they are still under the impression that they regard it as a part of the witness' obligation not to reveal what happened in the Grand Jury room, nor what took place there.

The Chairman. I believe we ought to have a little more investigation on that subject. Are there any other suggestions before we go to that uncontroversial topic No. 20?

(Laughter.)

Item 20: The rules might well permit comment by the judge and by the United States Attorney on defendant's failure to take the witness stand, as is allowed in some states, among them New Jersey.

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Mr. Seasongood. I am against that. There is a case somewhere that says that would be not be constitutional because it deprives you of the right not to incriminate yourself.

Mr. Youngquist. I believe it deprives you of the constitutional privilege of not protecting yourself.

Mr. Holtzoff. Now, the New Jersey rule has been upheld by the Supreme Court of the United States. It is not a violation.

Mr. Wechsler. Yes, but then again it appears like self incrimination.

Mr. Seth. It should not be counted against him.

Mr. Waite. Some years ago we had the same matter before our law committee and we took different positions as to what should be done; when it went to the floor of the institute it was very vigorously fought out on the basis of whether it was constitutional or not. If I remember correctly the vote was ninety-odd to forty-odd about the matter.

Mr. Holtzoff. I am not questioning the constitutionality. When you have a large group like that each individual member does not study the question, so the vote rather indicates the feeling of the participants.

Mr. Waite. I was going to suggest that the reporter put in the provisions that he feels should be presented and then let us fight it out on some particular provisions.

The Chairman. We will reserve a half a day of the meeting for that question.

(Laughter.)

Mr. Holtzoff. The last Attorney General recommended

it.

The Chairman. It has been almost universally endorsed by the crime association. I have the list here, so certainly we should go into the thing.

Mr. Seasongood. The man may have had other convictions. Therefore, in this case, it would be very unfair.

Mr. Waite. I suggest that the reporter bring in also provisions limiting the extent of cross-examination with reference to going into the man's prior record.

Mr. Wechsler. There is not only this question whether the judge should be allowed to comment on the floor of the failure of the defendant to testify, but also the question of the issue where the judge must affirmatively charge that the jury should draw no inference from his failure to testify.

Mr. Youngquist. That charge is always given when requested in the state laws.

Mr. Wechsler. It is provided by Federal laws.

The Chairman. Is there anything further at the moment on item No. 20?

(No response.)

The Chairman. Now, referring to item 21: Motions for direction of a verdict, either at the close of the prosecution's case or at the close of the entire case.

Mr. Holtzoff. That brings up your point about the reservation of such motion.

Mr. Baker. It is not very logical that the motion should come at the close of the prosecution's case.

Mr. Glueck. The prosecution's case may be rebutted.

Mr. Holtzoff. I think the rules committee should discuss

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such a motion.

The Chairman. Does that mean that he can put testimony in if he makes the charge before the end of the case?

Mr. Holtzoff. No.

Mr. Seth. If you didn't renew it it is a waiver in some of the states.

Mr. Holtzoff. It seems the plan at the end of the plaintiff's case is not a waiver to offer evidence if the motion is denied. And I think there should be a similar provision here.

Mr. Wechsler. May I suggest that this caption be broadened to include motions of trial in general. Presumably, we ought to go into the rules that cover the whole course of trial procedure. Motions for the suppression of evidence, or for mistrial, among others. This discussion ought not to include any of those.

The Chairman. Then you wish to include motions of trial and other included motions?

Mr. Wechsler. Yes, they raise issues of fact.

The Chairman. That is very desirable.

Mr. Seasongood. I suppose you can make a motion at the end of the prosecutor's case. But, you can't in a civil case.

Mr. Holtzoff. That has very rarely been the case.

Mr. Seasongood. But, if he wants to, he can.

The Chairman. Is there anything further you wish to discuss on point 21?

Mr. Wechsler. May I ask, Mr. Chairman, what if anything we shall do about the problems of evidence? That, I think, was one of the major issues that confronted the committee on

civil rules, and it is an issue that confronts us here. The problem is within the scope of our committee, I should think.

The Chairman. Well, suppose we ask Mr. Tolman to abstract what was said and done in the civil rules committee and furnish us with copies for our consideration. If necessary, we can decide what to do on that by correspondence, while the reporter is getting his draft out.

Mr. Wechsler. We are to get enough information to help us on some evidentiary problems.

Mr. Burns. We must keep in mindthat we do not have to have it.

Mr. Holtzoff. The civil rules committee did not put in a code of evidence.

The Chairman. Supposing we make point 21-A and call it evidence. Then, we will also go into that.

Mr. Wechsler. What about including a point that was suggested with respect to examination of witnesses--cross-examination?

Mr. Youngquist. Depositions.

Mr. Wechsler. No, not on depositions but with respect to the testimony of witnesses at the trial. That comes probably under the scope of cross-examination. Previously, we had suggested a particular issue where the defendant as a witness in his own behalf had refused to take the stand. Now, what is the extent to which he can be impeached by questions of prior convictions? I should think that whole subject is a very important one that ought not to be excluded.

The Chairman. Would this come under a separate topic or under evidence?

Mr. Burns. It should come as part of evidence.

The Chairman. Something like the scope of the examination of witnesses.

Mr. Seasongood. We should determine whether and to what extent cross-examination should be limited.

The Chairman. This whole matter of evidence, the scope of the examination of witnesses, is going to be a difficult decision to make. Mr. Tolman called my attention to rule 43, civil rules, which contains five points: (a) form of admissibility, (b) scope of examination and cross-examination, (c) record of excluded evidence, (d) affirmation in lieu of oath, (e) evidence on motions.

Mr. Holtzoff. There is a rule on the certification of documents.

Mr. Wechsler. There is a general rule on admissibility.

The Chairman. Let us call this form and admissibility.

Mr. Wechsler. The procedure of admissibility in civil cases could not, perhaps, be followed in criminal cases.

Mr. Seasongood. Would this be the place to suggest that no exception be necessary?

The Chairman. That would come under trial procedure. I think we might make a note of that under that heading.

Mr. Youngquist. There has been no question on separate trials. May I raise another question?

Mr. Seth. The whole matter should really be discussed.

Mr. Holtzoff. The granting of separate trials is discretionary with the court.

Mr. Youngquist. In some states it is a right. This is true in felony cases.

Mr. Holtzoff. In the Federal Court it is discretionary with the court.

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Mr. Wechsler. That whole problem in connection with indictments including nolo joinder is very important.

Mr. Seth. It is covered by the statute now.

Mr. Seasongood. Exceptions to the charge before the jury should be abolished.

Mr. Seth. The exception must be made before the jury retires.

Mr. Seasongood. It is very prejudicial to stand up and take your exception before the jury.

Mr. Holtzoff. We could recommend that no exceptions be taken during the course of the trial.

The Chairman. That brings us to item 22: Form of Verdict.

Mr. Baker. Under item 23, motions in arrest of judgment, in some states where you have a motion for certain things and a motion for a new trial, couldn't we cover that entire field with just one motion? There is no reason for two separate motions, one covering one thing and one another. Would it not be better to use motion for a new trial rather than arrest for judgment?

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Mr. Holtzoff. Of course there is a difference in the motions. Motion for new trial means exactly as the name implies. Whereas arrest for judgment calls for the dismissal of the case.

Mr. Burns. How about the term, motion after trial?

Mr. Holtzoff. Yes, a motion for a new trial and judgment, notwithstanding, is a single motion.

Mr. Glueck. That would be motions after a verdict.

Mr. Burns. Motions after a verdict, yes.

Mr. Seasongood. I supposed the right to have the jury (polled?) filed does not need any rule.

The Chairman. Common law requires it.

Mr. Seasongood. I don't know whether they know it.

Mr. Holtzoff. It is not in the civil rules.

Mr. Wechsler. We are to discuss it thoroughly because ultimately we might decide to eliminate it from the final draft.

Mr. Baker. Did you mean that we deal only with the form or provision for the correction of verdict?

Mr. Holtzoff. Well, motions for new trial are covered by the Criminal Appellate Rules.

Mr. Baker. No, I mean jury verdict, any verdict that is a waiver of some kind. Whether we would authorize the judge to correct the verdict.

Mr. Holtzoff. I suppose that question would come under this topic--this item.

The Chairman. Then, supposing we have the correction of forms under item 22? Are there any further suggestions with respect to this item?

Mr. Seth. Isn't that beyond our scope?

The Chairman. I think items 23, 24, 25, and 26 are all [illegible] our scope.

Mr. Holtzoff. No, not item No. 26.

The Chairman. Item No. 25, probation, is beyond our scope at the moment.

Mr. Youngquist. Shouldn't we consider them just the same?

The Chairman. All right, we will do that, then. You may

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hav· the reporter cover that ground.

Are there any suggestions on any of these three that have been just mentioned, 23, 24, and 25?

Mr. Glue[illegible]. Is the idea under item 24 that there should be a continuance, as routine practice, between the finding of guilt and the imposition of sentence, during which period a probation investigative report will be made?

Mr. Holtzoff. In some districts they do that now. In others, they make [illegible] investigations.

Mr. Glueck. [illegible] would be very helpful to get the fullest picture th[illegible] paper as to what the existing practice is.

The Chairman. I agree with that suggestion.

Mr. Baker. I would like to ask the reporter to consider the matter under item 22, form of verdict, the matter of filed [sealed?] verdict.

Mr. Holtzoff. We do not take filed [sealed?] verdicts in criminal cases. The question is whether it should be done.

Mr. Seth. We do it every [illegible].

Mr. Burns. We do it in Massachusetts.

Mr. Holtzoff. You mean the Federal Court in New Mexico?

Mr. Seth. Yes, sir.

Mr. Baker. Well, there ought to be some discussion on that.

The Chairman. That takes care of item No. 22.

Mr. Glueck. Apropos to item 24 of this question of records, and so forth, I wonder if it is desirable to require a line or two, at least, on the part of the judge indicating why he imposes the kind of sentence he does. That would

establish a tradition or precedent at present. The judge in indeterminate sentences may say two years or more than ten years. There is nothing to say what really moved him.

Mr. Holtzoff. But, if you have such a rule you ought to go further and require the judge to explain every rule that he makes. For example, he might deny a motion. Well, you require him to give his reasons for one type and not for the other type of rules.

Mr. Glueck. For instance, if we had a criminal court of appeals that reviewed laws and sentences, that might be an important part of the record to bring about uniformity of sentences or, at least, to bring about relevant principles of sentence. That is a rather radical thing.

Mr. Burns. I should think it would be really burdensome on the part of the judge.

Mr. Baker. Under the matter of sentences I would like to raise this question, whether or not we could work out a logical basis for a current or a consecutive sentence? What is the practice now?

Mr. Holtzoff. This is left to the discretion of the judge.

Mr. Baker. There is a tremendous amount of variation.

Mr. Holtzoff. Yes. Unfortunately, some do not set forth concurrent sentences. If the judge gets a feeling that the particular person should get the limit, why he employs such sentences whether or not he should serve consecutively.

Mr. Baker. Don't you think this is a case for a rule?

Mr. Holtzoff. I can't conceive of a rule to cover such a suggestion.

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Mr. Wechsler. When we deal with it would we address

ourselves to the number of counts and the nature of the counts? That would go into the indictment, for we don't have a different count. I am not sure that would be our scope.

Mr. Holtzoff. Of course, the reason the United States Attorneys multiply counts, like in mail-fraud cases, is that if they do not prove one count they may have other counts to prove. Fortunately, they prove all ten. That is, if they had ten counts to deal with. Fortunately, the average judge imposes a concurrent sentence. Sometimes, you get an erratic judge who gets the idea that a maximum penalty imposed by the statute is not sufficient and he uses this means on the defendant for a greater sentence.

Mr. Wechsler. Don't the United States Attorneys use that means for this purpose?

Mr. Holtzoff. The United States Attorney multiplies the counts to make sure that he does not get reversed. The Judicial Conference made a recommendation for concurrent sentences in the court at its meeting last fall.

Mr. Wechsler. I would suggest that the whole subject of sentences be put down tentatively. It is hard to say how far we can go.

Mr. Glueck. Maybe completely ultra vires.

Mr. Seth. Could we make the United States Attorney, in his indictment, specify that his indictment is one indictment?

Mr. Robinson. In New York that is done. The indictment states that it is a number from the same prosecution.

The Chairman. Now, are there any comments on item 25?

Mr. Glueck. I think item 25 would come in our scope if we

did not go into too much detail. For instance, (a) the complete prior criminal record, (b) a special investigation of the family background and general background. Probably under (c) we could have a psychological examination either necessary or at the discretion of the court.

Mr. Robinson. What is that based upon? Is there some difficulty with probation in the Federal Courts?

Mr. Holtzoff. No, the purpose of this was to get all the courts into line, put them all under the same standards.

Mr. Glueck. Yes, for the purpose of setting up standards.

Mr. Holtzoff. Forinstance, there are certain districts where the judges refuse to appoint probation officers.

Mr. Burns. This can be a very helpful provision in professionalizing the probation practice.

Mr. Wechsler. Isn't the probation service now under the jurisdiction of the court, anyhow?

Mr. Holtzoff. Yes, the probation service is under the jurisdiction of the court.

Mr. Wechsler. Probably it could be worked out in connection with what the administrative force is doing.

Mr. Tolman. I think we can get some help on this from the head of the probation section here.

The Chairman. Thank you, Mr. Tolman.

Now, referring to item 26: Special rules regulating procedure under Federal juvenile delinquency act.

Mr. Glueck. That is a whole system of rules in itself.

Mr. Holtzoff. Yes, the Department of Justice has worked out a set of rules that most of the courts are following. These rules are in the form of instructions to the United States

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Attorneys, and it may be that this matter might be of help in formulating the procedure. You would have to have a separate set of rules.

Mr. Baker. Does that come under our jurisdiction?

Mr. Holtzoff. Yes.

Mr. Baker. Juvenile delinquency cases throughout the states are not criminal.

Mr. Holtzoff. In the Federal system the juvenile is regarded as statutory because otherwise the Federal Government would have no jurisdiction.

Mr. Youngquist. I think the American Law Institute is going to consider at its next meeting the youth. This is going to deal with what we are talking about now.

Mr. Holtzoff. However, the delinquency act deals with juveniles up to 18, and the American Law Institute will deal with the substantive code of laws as well as the procedure.

Mr. Youngquist. It does include procedure and does not apply to minors.

Mr. Holtzoff. It applies to minors and youth up to 25. But it differs very widely from the juvenile delinquency act.

Mr. Youngquist. I had only in mind that it might have some material for us.

Mr. Waite. Mr. Holtzoff's answer is quite correct.

Mr. Glueck. Then item 26 would be entirely separate, an entirely separate topic at the end of business.

Mr. Holtzoff. I should think so.

Mr. Seth. We would not have anything to do with habeas corpus after sentence, would we?

The Chairman. I doubt it. I don't see how we would.

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Mr. Wechsler. On the other hand, Mr. Chairman, although it is civil procedure and therefore clearly beyond the scope of this act, the court has power to deal with it under the statute by virtue of which the civil rule is promulgated. It may well be that the Court might want the statutory provision regarding habeas corpus to be reconsidered and not to be questioned.

Mr. Glueck. Insanity cases, for instance, the right of habeas corpus has frequently been abused, as you probably know. A man is committed to a hospital under civil proceedings in order to hold him during the time, at least, that he is dangerous but very frequently he brings a writ of habeas corpus and before you know it he is out on the street again.

Mr. Holtzoff. There are two kinds of habeas corpus that there are in connection with civil cases and those that are connected with criminal cases. However, I just don't know whether we are supposed to cover habeas corpus. The decision is clear.

The Chairman. When the civil rules were drafted it was provided that it should apply to all rules, whether it be civil or criminal. Then, in that case, it should be dropped.

Mr. Burns. Yes.

Mr. Holtzoff. It wasn't the judgment that the Federal statutes were adequate.

The Chairman. Don't we have to determine whether it ties up?

Mr. Tolman. It seems to me that if the Committee feels that habeas corpus should be changed it would be an appropriate

point for discussion. Just as you have done with other topics that could be added to this list of 27.

Mr. Baker. I have just one more thing. How about the entry of nolle prossing? Shouldn't that be covered by a rule as to whether it should be entered in court with the consent of the judge or whether the judge can control it?

Mr. Holtzoff. The rule today is that the prosecutor's attorney has the full authority.

Mr. Burns. Is there a requirement that he must endorse it?

Mr. Holtzoff. That is a departmental rule.

Mr. Baker. The tendency of about a third of the states is to try to control the entry of nolle prossing. Some are required by statute that it be entered with the consent of the trial judge.

Mr. Holtzoff. I think that is not a necessity in the Federal statute because the Department of Justice controls the prosecutors. However, in the state the prosecutors are dependent upon politics.

Mr. Burns. The statute was amended since that time and there has been nc trouble of any kind.

Mr. Robinson. Yes, we will require the approval of the court. I remember one case where I brought a nolle pross to the judge and he refused approval.

Mr. Burns. I think the judge was afraid the check would bounce.

(Laughter.)

The Chairman. I think it would be a good idea to look into the rules.

Mr. Youngquist. We should have in mind the possibility of the states adopting the rules. I am referring to the rules of criminal procedure in the Federal courts as was done with the civil rules.

Mr. Holtzoff. The usual case is for the states to have different rules from the Federal Government.

Mr. Robinson. There is no sign that it could not be changed.

Mr. Seasongood. I should think it would be a good thing to let the judge have some say-so. It would have a deterrent effect. I have seen some instances where things have been nolle prossed in the Federal Courts where they should not have been.

Mr. Seth. How about the practice where the United States Attorney has not gotten the court's approval, or can't get the case to the judge and has the judge dismiss it on the judge's own permission?

Mr. Holtzoff. Well, that follows a departmental regulation.

Mr. Burns. Isn't it true that it has been the departmental regulation to go in and do nothing about it

Mr. Holtzoff. He has the legal power to nolle pross but the departmental regulations are that the man get the departmental approval or permission.

Mr. Burns. I suggest that the area of control is rather shadowy because after all he is a Presidential appointee.

Mr. Holtzoff. It is not shadowy. The statute provides that the Attorney Generals are subordinates of the Department even though they are not appointed by the President. So far as I know there has never been any difficulty on the part of

the United States Attorneys to refuse to follow departmental regulations on that subject. In fact, I think most United States Attorneys rather welcome the control because they feel that somebody shares the responsibility.

Mr. Glueck. Do they really get this permission in writing, or is it something approved?

Mr. Holtzoff. No, they get it actually in advance. What they do is write letters giving specific reasons why it should be nolle prossed.

Mr. Youngquist. That practice has been in force many years.

Mr. Holtzoff. In many cases the letters are not very detailed, but in more serious cases the department writes back if the letter were not sufficiently detailed.

Mr. Wechsler. It may be just the petty cases in the long run that will force a change in the rule of supervision in the states. I don't know that that supervision needs anything.

Mr. Holtzoff. I would not like to see lodged in the judge the right to decide whether a case may be nolle prossed.

Mr. Glueck. You would like?

Mr. Holtzoff. I would not.

Mr. Glueck. Why?

Mr. Holtzoff. The judge is much less acquainted about a case than the prosecuting attorney, and his action in the status would be, of course, purely formal. I would rather let the United States Attorney handle it.

Mr. Burns. Mr. Chairman, will you excuse me? I received a telephone call and I have to leave. However, I will get the necessary information, over the weekend, from Mr. Glueck.

The Chairman. We are approaching the end of the hearing, unless there are some additional topics that anyone wants to discuss.

There is a resolution that the Chairman should make a recommendation to the court for the employment of a working staff. Until such recommendations are made we understand that the reporter will carry on.

Mr. Glueck. I second the motion.

The Chairman. The motion has been seconded. All those in favor say Aye.

(There was a chorus of Ayes.)

The Chairman. All those not in favor say Nay.

(No response.)

Mr. Wechsler. Is it the proposal to wait until the draft of the whole thing is prepared and consider that, or to consider it piecemeal?

The Chairman. The reporter is to prepare the draft at the earliest possible moment. Well, the procedure of the civil rules committee was to prepare an entire draft. I think parts of it, as I understand from Mr. Tolman, are circulated in advance. But, the Committee did not begin to function on the draft until it had the whole picture. Then its work began.

Mr. Tolman. Well, no, it was sent in pages.

Mr. Holtzoff. It is hopeless to meet during the summer recess.

Mr. Seasongood. Why can't you have a draft by then?

TheChairman. There is a tremendous amount of research work to be done.

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Mr. Robinson. Every single Federal statute must be abstracted and a great many of the state statutes must be abstracted.

166 Mr. Seasongood. You must remember that Congress meets the first of January.

Mr. Holtzoff. I do not think that we will be able to submit it to Congress next January.

The Chairman. I doubt if it is advisable to rush through it and submit it to them by that time. They are not going to hurry through its approval even when we deliver it to them. Nothing can be done until their committees have an opportunity to function. The chief justice felt it was a three-year job. However, we may be able to complete the job in two years.

Mr. Holtzoff. In the other committee there were two primary drafts and then a final draft.

Mr. Youngquist. Did you have in mind some way of assigning work to this group? Whether it would be advisable for different members to work on different phases of the law?

The Chairman. I was going to ask each member of the Committee to state those portions of the law that he is particularly interested in and that he would be willing to give especial attention to. Such help would be of great assistance to the reporter. I don't know whether the members of the committee are ready to do that now or want some time to think it over.

I don't see very well how we are going to divide up the subcommittees, because we are so widely scattered. I had hoped that the ones who were coming down to the institute meeting here in Washington would, while in town, get together

and discuss the progress of the work. I doubt, however, if it would be worthwhile to call the full committee until the full draft has been completed.

Mr. Glueck. Is it the intention to have the reporter interview a number of Assistant Attorney Generals with a view to getting ideas for the draft? I think that might be a good idea.

The Chairman. I think it would have to be one of his assistants.

Mr. Holtzoff. We could get a lot of information through correspondence.

Mr. Tolman. We have attorneys going into each district at regular intervals, and if there is any particular question you would like to have us ask these United States Attorneys we would be glad to do it.

The Chairman. Mr. Chandler has very kindly put the facilities of his office at our disposal first in letting us have the time of Mr. Tolman and then in seeing that we were furnished with rooms in the building. He desired that we center our work here.

Mr. Glueck. Of course, questions would arise as Mr. Robinson proceeded. For instance, he might want to know how the different districts differ in the matter of nolle pross cases. I am referring to things along that line.

Mr. Holtzoff. That sort of information is already available.

Mr. Glueck. I am referring to specific conditions in various districts. I am talking about the procedure, pleas to lesser offenses, and so on.

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Mr. Holtzoff. Well, I am sure that we can get that information from the department because of their constant correspondence with the United States Attorney.

Mr. Glueck. Supposing that we were discussing probation and we wanted to know what the local probation officers were doing?

Mr. Tolman. We are in constant touch with the probation officers throughout the country.

Mr. Wechsler. That, incidentally, was a problem we did not take up, the problem of pleading to lesser offenses.

Mr. Youngquist. That would come under the heading that we have decided upon.

Mr. Holtzoff. Acceptance to pleas of lesser crime occur but, of course, is not as important in the Federal system as it is in the state. The reason is that the Federal statutes do not have as many different degrees of crime.

17 Mr. Glueck. How about common law crimes?

Mr. Holtzoff. No, we have two degrees of murder, but you don't have degrees of manslaughter.

Mr. Glueck. How about burglary?

Mr. Holtzoff. I don't recall that burglary is divided into degrees.

Mr. Wechsler. Well, there is the substance of a problem.

Mr. Holtzoff. You mean with reference to presenting the lesser degree?

Mr. Wechsler. It was suggested by one of the justices in an argument a couple of weeks ago that negotiation or discussion between the United States Attorney and the defendant with respect to the acceptance of the plea or the offer of the plea

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was to be procedurally regularized in some way, at least, as counsel ought to be. Probably suggested was the stronger word, but the suggestion was raised. There is a fruitful line of thought.

Mr. Seasongood. Does that invite a hypothetical case? The United States Attorney discussed that without the defendant's counsel.

Mr. Wechsler. I am referring to the moving papers, habeas corpus proceedings.

Mr. Baker. Did we decide to take the matter of nolo contendere? joinder up?

The Chairman. That was covered in one of the earlier rules.

Mr. Youngquist. That came under pleas, item 12. However, it is not specifically mentioned.

Mr. Holtzoff. Personally I would like to see it abolished.

Mr. Seasongood. Why should not it be abolished? I would suggest that specific laws be repealed instead of leaving ten laws in conflict. We should repeal that and that law specifically so that no doubt is left. The civil rules committee did not do that.

Mr. Holtzoff. Of course, the civil rules committee did not attempt to do that.

Mr. Seasongood. Haven't any discussions come about as a result of conflicts?

Mr. Holtzoff. In my observation no difficulty has arisen out of that yet.

Mr. Seasongood. I think repeal would be highly desirable were it possible.

Mr. Glueck. Of course, that is some load to put on the

reporter.

Mr. Seasongood. It is better to put the load on the reporter than to see the law inconsistent with the rule.

Mr. Youngquist. This committee should be able to tell well in advance what rules would be inconsistent.

Mr. Holtzoff. There is the difficulty that you may fail to mention some statute and then have the laws of the statute repealed.

Mr. Youngquist. I think what Mr. Holtzoff means is the absence of the specific section number.

The Chairman. I take it the reporter is going to prepare that table of statutes.

Mr. Robinson. That is right, Mr. Holman will help me.

Mr. Tolman. In the civil rules committee we had some difficulty in Congress as a resultof this appeal provision. A Senate Resolution was introduced to postpone the taking ~~into~~ effect of the rules on account of the tremendous number of statutes which were going to be superseded. The Congressmen wanted to know what was going to happen. It took all the force of the Attorney General and the President to straighten this thing out!

Mr. Holtzoff. I don't think it was that serious.

Mr. Tolman. We had some trouble with it. They will be frightened by a long list of repeals.

Mr. Glueck. Might they not be frightened by the lack of it?

Mr. Tolman. It depends on how long the list will be.

Mr. Glueck. Didn't the legislative council go over those things?

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Mr. Holtzoff. No, it has no such function.

Mr. Tolman. In fact, I think there is still a good deal of uncertainty as to what the status of some of the statutes is.

The Chairman. The question has been raised as to how to carry on our correspondence.

Mr. Robinson. You will address Mr. Tolman or the Advisory Committee on Rules of Criminal Procedure, addressed to the United States Supreme Court, Washington, D. C. This correspondence would go to the office of Mr. Tolman, which office

18 has been made available for the work.

I asked Mr. Tolman whether or not the minutes of this meeting, or an abstract of it, would be available for the members of the committee, and he said that they would be. Is it desirable that the minutes of this committee meeting or abstract be sent to each member of the committee?

Another question is whether every member of the committee has a copy available of the civil rules?

Mr. Seasongood. I would like to have one.

Mr. Tolman. Would you like us to send you a documentary history of the rules?

The Chairman. Yes.

Mr. Youngquist. Is it possible to get a duplicate of the letters that are submitted by the various members of this committee?

The Chairman. That is the practice, so that every member of the committee will be currently informed on what is going on among the members of the committee, lawyers and judges.

Mr. Baker. Are these headquarters going to be in Washington?

The Chairman. The Chief Justice thought that the work should center here in the building at Washington to the extent that Mr. Robinson finds it possible to do so.

Mr. Holtzoff. I am in Washington all the time.

Mr. Glueck. I wonder if any suggestions as to research assistants would be welcome or not welcome? Have any selections been made already?

Mr. Robinson. As far as I know the field is open.

The Chairman. The field is open with regard to suggestions, However, we can't do much about it until we get our appropriation.

Mr. Holtzoff. I am negotiating with the head of the criminal division for help.

Mr. Seasongood. At an earlier stage something was said about the criminal code of the American Law Institute being made available.

The Chairman. I think I can have it made available. I will see that every member is furnished with a copy of that.

I do hope that every member of the committee who is particularly interested in some one or more points may let us know, so as to facilitate those operations. I am hopeful that we can finish this job within a two-year period. I doubt if it is humanly possible to get it done by January next. The civil rules committee took three years, approximately. We have some problems that are more difficult, but I think that by following their experience, following their routine, we should be able to set the work up and get it to Congress by January, 1943.

Mr. Glueck. Is it planned to prepare a commentary on the rules?

The Chairman. Well, that was done in the civil rules where there were notes of explanation.

Of course, while we covered a great deal of points here I hope we will remember simplicity in content and simplicity in form. Both are easy expressions to remember but rather difficult to deliver.

Mr. Wechsler. The need for a commentary in this field is even greater because the sources of Federal law are more dubious than they were in civil procedure.

Mr. Robinson. There is the commentary by the American Law Institute. Their proposition with this committee is to take it up by commentaries which show whether the proposition is a law, a rule, and the authority for it. That would of course give us a much stronger standing both in Congress and even with the states. This guide, we hope, will be a Godsend.

The Chairman. I don't think the commentary is going to be helpful but rather it is going to be a source of raising questions.

Mr. Holtzoff. I agree with that. You are just furnishing material for controversy if you have a commentary. I believe that a commentary should not be issued at that time but at a later date for distribution.

The Chairman. Just the same as we may find it advisable to give out the listing of the repeal bills after the rules have been adopted.

Gentlemen, are there any more matters that we can take up

today?

(No response.)

The Chairman. I have a telegram here from Judge Crane. Judge Crane expected to come but was stricken with the grippe. Here is the contents of this telegram:

"Laid up with the grippe. Sorry to miss meeting. If possible let me know what has been done. Signed, Frederick E. Crane."

Mr. Medalie has been unable to attend and sent the following telegram:

"Deeply regret that court's inability to suspend trial compels my foregoing pleasure of attending opening meeting of committee. Appreciate advice as to assignment, et cetera. Signed, George Z. Medalie."

Mr. Burke is in the hospital.

Mr. Dean is out of town.

Mr. Glueck. I should think, Mr. Chairman, a copy of the minutes of this meeting would be very helpful to the absentee members, together with a copy of the outline by Mr. Holtzoff.

The Chairman. Mr. Tolman suggests that the abstract of the civil rules committee be sent to you so as to ascertain

19 what they were doing there. We have included a good many things that we find are beyond our scope. It seems to me that we can come to an agreement on these things by correspondence, or if they cannot be worked out we will have to arrange meeting for a day or two sometime.

I doubt if we are ready to send the minutes to the Court. I think they should be a little more crystallized.

Are there any other suggestions, motions, or recommendations?

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(No response.)

The Chairman. Is there a motion to adjourn?

(This motion was seconded by the members of the Committee.)

(The meeting adjourned at 3:20 o'clock p. m.)

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